152 U.S. 527

RECORD, CASE No. 14,275.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

TERM No., 256.

S. M. HUNTLEY, S. M. WHITE, JAMES RENNIE, SAMUEL PAUL, AND J. J. SALTER, PLAINTIFFS IN ERROR,

vs.

KINGMAN & CO.

IN ERROR TO THE UNITED STATES COURT FOR INDIAN TERRITORY

FILED OCTOBER 14, 1890.

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1 UNITED STATES OF AMERICA, }
Indian Territory. }

In the United States Court in the Indian Territory.

KINGMAN & COMPANY, Plaintiff. }
vs. } Civil Action. No. 531.
W. H. DUNCUM, Defendant. }

Now, on this 28th day of September, A. D. 1889, comes the plaintiff, Kingman & Co., by its attorneys, and files in the clerk's office of this court its complaint, bond for costs, affidavit, and bond for attachment; which bonds having been duly approved, a summons and writ of attachment issued herein.

Now, on this 3d day of October, A. D. 1889, comes the plaintiff, by its attorneys, and files in the clerk's office of this court its affidavit for garnishment; whereupon a writ of garnishment was issued against H. C. Randolph, Lyman Friend, J. J. Salters, and S. M. White.

Now, on this 25th day of October, A. D. 1889, comes the United States marshal for the Indian Territory and files in the clerk's
2 office of this court the summons, writ of attachment, and writ of garnishment herein, with his return duly made thereon.

Now, on this 4th day of November, A. D. 1889, comes James Rainie, Samuel Paul, S. M. Huntly, S. M. White, and J. J. Salters and file in the clerk's office of this court their interplea herein.

Court met, pursuant to adjournment, at the United States court-room, in the town of Muscogee, in the Indian Territory, this 16th day of December, A. D. 1889, at nine o'clock in the forenoon.

Present: The Honorable James M. Shackelford, judge of said court, presiding; Wm. Nelson, Esqr., clerk of said court; T. B. Needles, marshal of the Indian Territory, and Zachary T. Walrond, Esqr., United States attorney for said court.

The marshal then, by order of court, made proclamation that the court was now open and ready for the transaction of such business as might lawfully come before it.

Whereupon among the proceedings had were the following:

KINGMAN & CO. }
vs. } 531. Interplea Filed.
W. H. DUNCAN. }

On this day come James Rennie, Samuel Paul, S. M. Hunt-
3 ley, S. M. White, and J. J. Salters, by their attorneys, and by leave of court file their interplea herein.

Court met, pursuant to adjournment, at the United States court-room, in the town of Muscogee, in the Indian Territory, this 17th day of December, A. D. 1889, at nine o'clock in the forenoon.

Present: The Honorable James M. Shackelford, judge of said court, presiding; Wm. Nelson, Esqr., clerk of said court; T. B. Needles,

Esqr., United States marshal for the Indian Territory, and Zachary T. Walrond, Esqr., United States attorney for said court.

The marshal, by order of court, made proclamation that the court was now open and ready for the transaction of such business as might lawfully come before it. Among the proceedings had were the following, to wit:

KINGMAN & Co. *vs.* W. H. DUNCUM, Defendant; JAMES RENNIE *et al.*, Interpleaders.	531. Order of Sale.

This day coming on to be heard the application for an order to sell the property attached in this cause, counsel for the plaintiff and interpleaders consent to the following order:

It is ordered by the court that the marshal sell at private sale the property attached in this cause to the best advantage,
4 and that the trustee, J. J. Salters, join in said sale so as to pass the unincumbered title of said property, and that the marshal hold the proceeds subject to the order of this court.

Now, on the 17th day of December, 1889, the clerk of the court, Wm. Nelson, furnished the marshal of this court with a duly certified copy of the above order.

Now, on this 7th day of February, A. D. 1890, comes the United States marshal for the Indian Territory and files in the clerk's office the order of sale heretofore issued on the 17th day of December, A. D. 1889, with his return thereon.

Be it remembered that the honorable United States court for the Indian Territory met in regular term at the United States court-room, in the town of Muscogee, in the Indian Territory, on the first Monday in April, A. D. 1890, the same being the 7th day of April, A. D. 1890, at nine o'clock in the forenoon of said day.

Present: The Honorable James M. Shackelford, sole judge of said court; Wm. Nelson, Esqr., clerk of said court; Thomas B. Needles, Esqr., United States marshal for the Indian Territory, and Zachary T. Walrond, Esqr., United States attorney for said court.

5 Thereupon, by order of the court, the crier made proclamation that said court was now open and ready for the transaction of such business as might lawfully come before it. Whereupon among the proceeding had were the following, to wit:

KINGMAN & Co. *vs.* W. H. DUNCAN; S. M. WHITE, Garnishee.	531. Answer of Garnishee.

On this day comes said S. M. White, garnishee herein, by his attorneys, and files his answer as such garnishee.

Court met, pursuant to adjournment, at the United States court-room, in the town of Muscogee, in the Indian Territory, on this 9th day of April, A. D. 1890, at nine o'clock in the forenoon.

Present: The Honorable James M. Shackelford, judge of said court, presiding; Wm. Nelson, Esqr., clerk of said court; Thomas B.

Needles, United States marshal for the Indian Territory, and Zachary T. Walrond, Esqr., United States attorney for said court.

By order of the court the crier made proclamation that the United States court in the Indian Territory was now in session and ready for the transaction of such business as might lawfully come before it. Whereupon the following proceedings, among others, were had, to wit:

6	KINGMAN & Co. *vs.* W. C. RANDOLPH, Garnishee of W. H. Duncum.	531.	Answer of Garnishee.

On this day come W. C. Randolph, by his attorney, and files his answer as garnishee herein.

Court met, pursuant to adjournment, at the United States court-room, in the town of Muscogee, in the Indian Territory, this 13th day of May, A. D. 1890, at nine o'clock in the forenoon.

Present: The Honorable James M. Shackelford, judge of said court, presiding; Wm. Nelson, Esqr., clerk of said court; Thomas B. Needles, marshal of the Indian Territory, and Zachary T. Walrond, Esqr., United States attorney for said court.

Thereupon, by order of court, the crier made proclamation that the United States court for the Indian Territory was now open and ready for the transaction of such business as might lawfully come before it.

Among the proceedings had were the following, to wit:

	KINGMAN & Co. *vs.* W. H. DUNCUM.	531.	Demurrer.

On this day come the parties, by their respective attorneys, and, the demurrer heretofore filed coming on to be heard, the
7 court, after hearing the argument of counsel and being sufficiently advised in the premises, doth overrule the same.

Court met, pursuant to adjournment, at the United States court-room, in the town of Muscogee, in the Indian Territory, this 17th day of May, A. D. 1890, at nine o'clock in the forenoon.

Present: The Honorable James M. Shackelford, judge of said court, presiding; Wm. Nelson, clerk; T. B. Needles, marshal, and Zachary T. Walrond, Esqr., United States attorney for said court.

By order of the court, the crier made proclamation that the United States court for the Indian Territory was now in session and ready for the transaction of such business as might lawfully come before it; whereupon the following proceedings, among others, were had, to wit:

	KINGMAN & Co. *vs.* W. H. DUNCUM.	531.	

On this day come the plaintiff, by their attorneys, Hinds and Jackson, and file their demurrer to the interplea herein.

Court met, pursuant to adjournment, at the United States court-room, in the town of Muscogee, in the Indian Territory, this 19th day of May, A. D. 1890, at nine o'clock in the forenoon.

8 Present: The Honorable James M. Shackelford, judge of said court, presiding; Wm. Nelson, Esqr., clerk; T. B. Needles, Esq., U. S. marshal; Z. T. Walrond, Esq., U. S. attorney for said court.

By order of court, the crier made proclamation that the United States court for the Indian Territory was now open and ready for the transaction of such business as might lawfully come before it; whereupon the following, among other, proceedings were had, to wit:

KINGMAN & CO. vs. W. H. DUNCUM. } 531. Demurrer to Interplea.

On this day come the attorneys for the plaintiffs and defendants, and, the demurrer to the interplea heretofore filed coming on to be heard, the court, having seen and inspected the same and heard the argument of counsel and being fully advised in the premises, doth overrule the same.

KINGMAN & CO. vs. W. H. DUNCUM. } 531. Answer to Interplea.

On this day come the plaintiffs, by their attorney, and file their answer to the interplea herein.

KINGMAN & COMPANY vs. W. H. DUNCUM and Others. } 531.

9 Comes now the plaintiffs, by Hinds and Jackson, its attorneys, but the defendant W. H. Duncum, being three times called, comes not, but herein makes default, and it appearing to the court that said defendant Duncum has been duly served with process more than twenty days before the first day of the present term of this court and the plaintiff having proved its damages, the court assesses the same at two thousand and ninety-five $\frac{65}{100}$ dollars. It is, therefore considered and adjudged that the plaintiff recover of said defendant, W. H. Duncum, the sum of two thousand and ninety-five $\frac{65}{100}$ dollars, together with costs; and now here come the interpleaders, James Rennie, S. M. White, Samuel Paul, S. M. Huntley, and J. J. Salters, by their attorneys, C. L. Potter and S. S. Fears, and the plaintiff having filed its demurrer to the interplea herein, which demurrer upon argument and due consideration the court, with the view of hearing the testimony, overruled; whereupon the plaintiff filed its answer to said interplea; and, the issues being joined, come also the jurors of the jury, to wit, Chas. Woodard, John S. O'Brian, T. C. Harrison, H. C. Lowery, Chas. Neal, W. W. Haynes, J. J. Corbut, A. M. Lawson, W. F. Crabtree, Wm. Barker,

Douglas Benore, and Ned Robbins, twelve good and lawful
10 men duly elected, tried, and sworn, and the jury, having heard the evidence and arguments of counsel and having received their charge from the court, retire to consider their verdict in charge of the bailiff, duly sworn, and now return into court the following verdict:

"KINGMAN & Co., Plaintiff.
vs.
W. H. DUNCUM *et als.*, Defendants.

We, the jury, find the issues between the interpleaders and the plaintiff in favor of the plaintiff.

W. W. HAYNES, *Foreman.*"

And thereupon the interpleaders moved the court for a new trial for the written causes now filed; which motion, upon argument and due consideration, is overruled. It is therefore considered that the interpleaders take nothing by their suit and interplea; that the plaintiff recover of and from said interpleaders all the property, goods, wares, merchandise, money, and credits which came into their hands under or by virtue of said deed from defendant W. H. Duncum.

It is further considered and adjudged that the plaintiff's attachment herein be, and the same is hereby, sustained, and the United States marshal of the Indian Territory will pay to the plaintiff the money, not exceeding the amount of its judgment and costs, now in his hands arising from the sale of the attached property herein, and proceed to dispose of the other attached property, according to law, as though no interplea had been filed herein. It is further ordered and adjudged that the plaintiff recover of said interpleaders its costs
11 herein expended by reason of said interplea; to which judgment of the court the interpleaders except and pray an appeal to the Supreme Court of the United States, which prayer is granted.

Court met, pursuant to adjournment, at the United States court-room, in the town of Muscogee, in the Indian Territory, this 20th day of May, A. D. 1890, at nine o'clock in the forenoon.

Present: The Honorable James M. Shackelford, judge of said court, presiding; William Nelson, Esqr., clerk; Thomas B. Needles, Esqr., marshal, and Zachary T. Walrond, Esqr., United States attorney of said court.

By order of the court the crier made proclamation that the United States court for the Indian Territory was now in session and ready for the transaction of such business as might lawfully come before it; whereupon the following, among other, proceedings were had:

KINGMAN & Co.
vs. 531. Motion for a New Trial.
W. H. DUNCUM.

On this day come the interpleaders, by their attorneys, and file their motion for a new trial herein, which being seen and inspected

by the court, after hearing the argument of counsel and being sufficiently advised in the premises, doth overrule the same.

12 KINGMAN & Co. } 531.
vs.
W. H. DUNCUM. }

On this day come the interpleaders, by their attorneys, and pray an appeal to the Supreme Court of the United States, and that the court fix the amount of their bond for a supersedeas herein. The court, after due deliberation had and being fully advised in the premises, fixes the amount at the sum of five thousand dollars and orders that upon filing the necessary affidavit and bond in said sum as the law directs that said appeal be allowed.

Court met, pursuant to adjournment, at the United States court-room, in the town of Muscogee, in the Indian Territory, this 29th day of May, A. D. 1890, at nine o'clock in the forenoon.

Present: The Honorable James M. Shackelford, judge of said court, presiding; Wm. Nelson, clerk; T. B. Needles, Esqr., United States marshal for the Indian Territory, and Zachary T. Walrond, Esqr., United States attorney for said court.

By order of court the crier made proclamation that the United States court in the Indian Territory was now in session and ready for the transaction of such business as might lawfully come before it; whereupon the following, among other, proceedings were had, to wit:

13 KINGMAN & Co. } 531. Affidavit.
vs.
W. H. DUNCUM. }

On this day come the interpleaders and file affidavit of the amount in controversy herein.

Court met, pursuant to adjournment, at the United States court-room, in the town of Muscogee, in the Indian Territory, on this 5th day of June, A. D. 1890, at nine o'clock in the forenoon of said day.

Present: The Honorable James M. Shackelford, judge of said court, presiding; Wm. Nelson, Esqr., clerk of said court; Thomas B. Needles, United States marshal for the Indian Territory, and Zachary T. Walrond, Esqr., United States attorney for said court.

By order of court the crier made proclamation that the United States court in the Indian Territory was now open and ready for the transaction of such business as might lawfully come before it; whereupon the following, among other, proceedings were had, to wit:

KINGMAN & Co. } 531.
vs.
W. H. DUNCUM. }

On this day come the interpleaders, by their attorney, and file herein petition for writ of error, assignment of error, bill of
11 exceptions, citation in error, writ of error, and *and* supersedeas bond.

Court met, pursuant to adjournment, at the United States court-room, in the town of Muscogee, in the Indian Territory, on this 1st day of July, A. D. 1890, at nine o'clock in the forenoon.

Present: The Honorable James M. Shackelford, judge of said court; Wm. Nelson, Esq., clerk of said court; T. B. Needles, Esq., United States marshal for the Indian Territory, and Zachary T. Walrond, Esq., United States attorney for said court.

By order of the court the crier made proclamation that the United States court in the Indian Territory was now in session and ready for the transaction of such business as might lawfully come before it; whereupon the following, among other, proceedings were had, to wit:

KINGMAN & CO. }
vs. } 531.
W. H. DUNCUM. }

On this day come the parties and by agreement it is ordered that the interpleaders be given 60 days additional in which to appeal this cause.

Court met, pursuant to adjournment, at the United States court-room, in the Indian Territory, on the 25th day of August, A. D. 1890, at nine o'clock in the forenoon.

Present: The Honorable James M. Shackelford, judge of
15 the United States court, in the Indian Territory; William Nelson, Esqr., clerk of said court; Thomas B. Needles, Esqr., United States marshal for the Indian Territory, and Zachary T. Walrond, Esq., United States attorney for said court.

By order of the court the crier made proclamation that the United States court in the Indian Territory was now in session and ready for the transaction of such business as might lawfully come before it; whereupon the following, among other, business was transacted, to wit:

KINGMAN & CO. }
vs. } 531. Time Granted to Perfect the Appeal.
W. H. DUNCUM. }

On this day come the interpleaders, by S. S. Fears, one of their attorneys, and ask for additional time in which to perfect the appeal herein, which the court, having seen and heard and being fully advised in the premises, doth grant.

KINGMAN & CO. }
vs. } 531. Substituted Petition.
W. H. DUNCUM. }

Now, on this day, come the interpleaders, by S. S. Fears, one of their attorneys, and shows to the court that the petition for writ of error heretofore filed on the 5th day of June, 1890, has been
16 lost or mislaid, and ask leave to file a substituted petition therefor, which the court, having seen and heard and being fully advised in the premises, doth order the same filed *nunc pro tunc*.

17 In the United States Court for the Indian Territory.

KINGMAN & COMPANY, Plaintiff, *against* W. H. DUNCUM, Defendant. } Civil Action No. 531. Complaint at Law.

UNITED STATES OF AMERICA, *Indian Territory*, } ss:

The above-named plaintiff, Kingman and Company, complaining of the above-named defendant, W. H. Duncum, says—

That the said Kingman and Company, plaintiff, is a corporation organized and incorporated under the laws of the State of Illinois, in the United States, whose chief officer is Martin Kingman, a citizen of the United States and a resident of the State of Illinois, and whose principal offices are in the respective cities of Peoria, in the State of Illinois, and St. Louis, in the State of Missouri, and that the said W. H. Duncum, whose full name is unknown, is a white man, a citizen of the United States and a resident of and a person found within the Indian Territory and within the jurisdiction of this court.

And the said Kingman and Company, plaintiff and corporation as aforesaid, for cause of action against the said W. H. Duncum, defendant, states and avers the following, to wit:

That on the nineteenth day of July, A. D. 1889, the said W. H. Duncum, the defendant herein, made, executed, and delivered to the said Kingman and Company, the plaintiff herein, his certain

18 promissory note, wherein and whereby he promised and agreed to pay to the said Kingman and Company, plaintiff, or order, the sum of one thousand dollars ($1,000) for a valuable consideration and at the time and place mentioned therein; which note, contract, and obligation is in words, figures, and characters as follows, to wit:

$1,000. St. Louis, Mo., *July* 19, 1889.

On or before the 1st day of October, 1889, the undersigned, whose post office is Beef Creek, Indian Territory, promise to pay Kingman and Company (incorporated) or order one thousand dollars, at Gainesville National bank, for value received, with ten per cent. interest from maturity until paid, with exchange on St. Louis or express collection charges.

W. H. DUNCUM.

And the said Kingman and Company, plaintiff and corporation as aforesaid, for further cause of action against the said W. H. Duncum, defendant, states and avers the following, to wit:

That on the nineteenth day of July, A. D. 1889, the said W. H. Duncum, the defendant herein, made, executed, and delivered to the said Kingman and Co., the plaintiff herein, his certain promissory note, whereby and wherein he promised and agreed to pay to the said Kingman and Co., plaintiff, or order, the sum of nine hundred and ninety-four dollars and forty-two cents ($994.42) for a

valuable consideration and at the time and place mentioned therein; which note, contract, and obligation is in words and figures and characters as follows, to wit:

$994.42. St. Louis, Mo., *July* 19, 1889.

On or before the 1st day of November, 1889, the under-
19 signed, whose post office is Beef Creek, Indian Territory, promise to pay Kingman & Co. (incorporated) or order nine hundred and ninety-four dollars and forty-two cents ($994.42), at Gainesville National bank, for value received, with ten per cent. interest from maturity until paid, with exchange on St. Louis or express charges.

W. H. DUNCUM.

And the said Kingman & Co., plaintiff, for further cause of action against the said W. H. Duncum, defendant, avers and states as follows, to wit:

That the said W. H. Duncum, the defendant, owes Kingman & Co., the plaintiffs, upon the notes aforesaid the sum of nineteen hundred and ninety-four dollars and forty-two cents ($1,994.42); one thousand dollars of which will be due on the first of October, 1889, and nine hundred and ninety-four dollars and forty-two cents will be due on the first of November, 1889.

That the said W. H. Duncum, the defendant, has sold, conveyed, and otherwise disposed of his property and has suffered and permitted it to be sold with the fraudulent intent to cheat or defraud his creditors and to hinder and delay them in the collection of their debts, and is about to remove his property, or a material part thereof, out of the Indian Territory with the intent or to the effect of cheating and defrauding his creditors and of hindering and delaying them in the collection of their debts.

Wherefore the said Kingman & Co., plaintiff, pray- the
20 court for an order of attachment in this action for the reasons and causes set forth in this complaint and for judgment against the defendant, W. H. Duncum, for the sum of nineteen hundred and ninety-four dollars and forty-two cents ($1,994.42), with interest on one thousand dollars from the first of October, 1889, at ten per cent. per annum, and interest from November first, 1889, on nine hundred and ninety-four dollars and forty-two cents at ten per cent. per annum, together with the costs of this action and all other proper relief.

HINDS, JACKSON & ELLIOTT,
Attorneys for Plaintiff.

S. O. Hinds, being duly sworn, on his oath says that he is one of the attorneys for the plaintiff in the above action, who is absent from the Indian Territory, and that he verily believes that the statements contained in the foregoing complaint are true.

S. O. HINDS.

Sworn to and subscribed before me this 28th day of September, 1889.

WM. NELSON, *Clerk*,
[SEAL.] By R. W. SHACKELFORD, *Deputy*.

21 In the United States Court for the Indian Territory.

KINGMAN & COMPANY, Plaintiff, } Civil Action No. —. Affidavit
vs. for Attachment.
W. H. DUNCUM, Defendant. }

UNITED STATES OF AMERICA, }
Indian Territory, } *ss.*:

The plaintiff, Kingman and Company, a corporation, by S. O. Hinds, attorney for said Kingman & Co., states that the claim in this action against the defendant, W. H. Duncum, is for money that the said W. H. Duncum, defendant, owes the said Kingman & Co., plaintiff, upon two certain promissory notes not yet due; that the claim is just; that the said Kingman & Co., plaintiff, ought, as affiant believes, recover thereon the sum of nineteen hundred and ninety-four dollars and forty-two cents ($1,994.42), and that the said W. H. Duncum, defendant, is about to remove his property, or a material part thereof, out of the Indian Territory, not leaving enough therein to satisfy the plaintiff's claim or the claims of said defendant's creditors, and that the said W. H. Duncum, defendant, has sold, conveyed, and otherwise disposed of his property and suffered and permitted it to be sold with the fraudulent intent to cheat, hinder, and delay his creditors.

Wherefore the said Kingman & Co., plaintiff, prays for an order of attachment in this action.

S. O. HINDS.

22 Sworn to and subscribed before me this 28th day of September, 1889.

WM. NELSON, *Clerk*,
[SEAL.] By R. W. SHACKELFORD, *Deputy*.

23 In the United States Court for the Indian Territory.

KINGMAN & COMPANY, Plaintiff, } Civil Action No. —. Bond in
vs. Attachment.
W. H. DUNCUM, Defendant. }

We undertake that the plaintiff, Kingman & Co., shall pay to the defendant, W. H. Duncum, all damages which he may sustain by reason of the attachment in this action if the order therefor is wrongfully obtained.

KINGMAN & COMPANY,
Attest: By their attorneys, HINDS, JACKSON & ELLIOTT.
C. TURNER & BRYNE.

Approved Sept. 28th, 1889.

WM. NELSON, *Clerk*,
By W. R. SHACKELFORD, *Deputy*.

Bond for Costs.

We undertake that the plaintiff, Kingman & Co., shall pay to the defendant, W. H. Duncum, the costs of this action and the officers' costs therein, if adjudged to pay the same by the court.

KINGMAN & COMPANY,
Attest: By their att'ys, HINDS, JACKSON & ELLIOTT.
TURNER & BRYNE.

Approved Sept. 28, 1889.

WM. NELSON, *Clerk*,
By W. R. SHACKELFORD, *Deputy*.

24 [Endorsed:] No. 531. In the United States — for the Indian Territory. Kingman & Co., plaintiff, *vs.* W. H. Duncum, defendant. Complaint at law. Filed Sept. 28, 1889. Wm. Nelson, clerk, by W. R. Shackelford, deputy. Hinds, Jackson & Elliott, attorneys for plaintiff.

25 In the United States Court for the Indian Territory.

KINGMAN & COMPANY, Plaintiff, *vs.* W. H. DUNCUM, Defendant. } Civil Action No. 531. Affidavit for Garnishment.

UNITED STATES OF AMERICA, *Indian Territory*, } ss.

The plaintiff in the above action states that the defendant, W. H. Duncan, is indebted to Kingman & Co., the said plaintiff, for money due upon two promissory notes made and executed by the said W. H. Duncan, the defendant, and delivered to the said Kingman & Co., plaintiffs; that they ought to recover thereon the sum of two thousand dollars; that the claim is just and ought to be paid, and that the plaintiff believes and has reason to believe that H. C. Randolph, Lyman Friend, J. J. Salters, and S. M. White, of the Indian Territory, are severally indebted to the said W. H. Duncan and have goods, chattels, monies, rights and credits, and effects in their hands and under their control belonging to the defendant.

Wherefore the said plaintiff prays for a writ of garnishment against the said J. J. Salters, H. C. Randolph, Lyman Friend, and S. M. White, and that the United States marshal for the Indian Territory, who has charge of the writ of summons and order of attachment herein, be commanded to summons the said J. J. Salters, H. C. Randolph, Lyman Friend, and S. M. White as gar-
26 nishees to answer on the first day of the next term of court for the Indian Territory.

KINGMAN & COMPANY,
By their att'ys, HINDS, JACKSON & ELLIOTT.

S. O. Hinds, of lawful age, being duly sworn, on his oath says that he is one of the attorneys for the plaintiff, who is absent from

the Indian Territory, and that he verily believes that the statements contained in the foregoing affidavit are correct and true.

S. O. HINDS.

Sworn to and subscribed before me this third day of October, 1889.

[SEAL.] WM. NELSON, *Clerk.*

[Endorsed:] No. 531. Kingman & Co., plaintiff, *vs.* W. H. Duncum, defendant. Filed Oct. 9th, 1889. Wm. Nelson, clerk. H., J. & E.

27 BEEF CREEK, *Oct.* 15, 1889.

Received of T. M. Wright, dept. U. S. M., five dollars for services rendered in taking stock in the case of Kingman & Co. *vs.* W. H. Duncan.

$5.00. (Signed) J. J. SALTER.

PAUL'S VALLEY, *Oct.* 15, 1889.

Received of T. M. Wright twelve dollars for hire of team.

$12.00. (Signed) E. P. BAKER AND BRADY.

28 In the United States Court for the Indian Territory.

KINGMAN & COMPANY, Plaintiff, *vs.* W. H. DUNCAN, Defendant. } Order of Attachment. No. 531.

The President of the United States of America to the marshal of the Indian Territory:

You are commanded to attach and safely keep the property of the defendant, W. H. Duncan, in your district not exempt from execution, or so much thereof as will satisfy the claim of Kingman & Company, the plaintiff in this action, for nineteen hundred and ninety-four dollars and forty-two cents and thirty dollars for the costs thereof, and to summon W. H. Duncan, H. C. Randolph, Lyman Friend, and J. J. Salters and S. M. White and such other persons as the plaintiff may suggest as garnishees to answer this action on the first day of the next April term, 1890, of the United States court for the Indian Territory, at Muscogee, Indian Territory, and you will make the return of this order on that day.

Witness the Honorable James M. Shackelford, judge of said court, and the seal thereof, at Muscogee, Indian Territory, this 28th day of September, A. D. 1889.

WM. NELSON, *Clerk.*

[SEAL.] By W. R. SHACKELFORD, *Deputy.*

28½ [Endorsed:] No. 531. Order of attachment. Writ issued 9, 28, 1889. Returnable April —, 1889. Filed Oct. 25th, 1889. Wm. Nelson. Service, $2.00; miles, 285 x 6, 17.10; extra, 21.25. Hinds, J. & E., att'y. for plaintiff.

This writ of attachment came to hand at Muscogee, I. T., Oct. 8th, 1889. I certify I executed this writ on Beef creek, Pickens county, Chickasaw nation, I. T., Oct. 12th, 1889, at 2 p. m., by levying and taking into possession, and have the same subject to the order of the court, the following-described property hereunto attached and marked Exhibit A, the same being a part of this return.

THOS. B. NEEDLES,
U. S. Marshal, Muscogee Dist., I. T.,
By T. M. WRIGHT, *Dept.*

29 UNITED STATES OF AMERICA, }
Indian Territory. }

The President of the United States of America to the marshal of the Indian Territory:

You are commanded to summons W. H. Duncan to answer on the first day of the next April term of the United States court for the Indian Territory, being the 7th day of April, A. D. 1890, a complaint filed against him in said court by Kingman & Company, and warn him that upon his failure to answer the complaint will be taken for confessed, and you will make due return of the summons on the first day of the next April term of said court.

Witness the Honorable James M. Shackelford, judge of said court, and the seal thereof, at Muscogee, Indian Territory, this 28th day of September, A. D. 1889.

[SEAL.] WM. NELSON, *Clerk,*
By R. W. SHACKELFORD, *Deputy.*

29½ [Endorsed:] No. 531. Kingman & Co. *vs.* W. H. Duncan. Summons. Summons issued Sept. 28th, 1889. Returnable April term, 1890. Returned and filed Oct. 25th, 1889. Wm. Nelson, clerk. Marshal's fees, 2.00; miles, 285 x 6, 17.10. Hind, Jackson & Elliott, att'y- of plaintiff.

This summons came to hand at Muscogee, I. T., Oct. 8th, 1889, and executed Oct. 12th, A. D. 1889, by reading to the defendant this process and delivering to him in person a copy of the same at Duncum's store, on Beef creek, Pickens Co., Chickasaw nation, I. T.

THOS. B. NEEDLES,
U. S. Marshall, Muscogee Dist, I. T.,
By T. M. WRIGHT, *Dept.*

United States of America, } ss:
Indian Territory, }

In the United States Court for the Indian Territory.

Kingman & Company }
vs. } No. —. Garnishment.
S. M. White, Garnishee of W. H. Duncan. }

The President of the United States of America to the marshal of the Indian Territory, Greeting:

Whereas Kingman & Co., a corporation duly organized and existing under and by virtue of the laws of the State of Illinois, on the 28th day of September, A. D. 1889, sued out their certain writ of attachment against the property of one W. H. Duncan from the clerk's office of the United States court for the Indian Territory for the sum of nineteen hundred and ninety-four dollars and forty-two cents debt and thirty dollars costs of suit, which said debt and costs it is alleged remain wholly unsatisfied, and it being represented by said plaintiff that S. M. White is indebted to the defendant and has goods and chattels, money, rights, credits, and effects in his hands and under his control belonging to the defendant, you are therefore commanded to summons the said S. M. White to appear before the United States court for the Indian Territory on the first day of the April term, A. D. 1890, thereof, the same being the 7th day of April, A. D. 1890, then and there to answer what goods, chattels, moneys, credits, or effects he may have in his hands belonging to the said defendant to satisfy the said claim of Kingman & Co. and to answer such further interrogations as may there and then
31 be exhibited against him, and hereof fail not.

Witness the Honorable James M. Shackelford, judge of said court, and the seal thereof, this 3rd day of October, A. D. 1889.

[SEAL.] W. Nelson, *Clerk.*

31½ [Endorsed:] No. 536. Kingman & Co. *vs.* S. M. White, gar. of W. H. Duncan. Issued Oct. 3rd, 1889. Returnable April term, 1890. This writ of garnishment — at Muscogee, I. T., Oct. 8th, 1889. I certify I executed the same at Duncan's store, on Beef creek, I. T., Oct. 11th, 1889, by reading the within writ to the within-named S. M. White and delivering to him in person a copy of the same. T. B. Needles, U. S. marshal, Muscogee dist., I. T., by T. M. Wright, dept. Marshal. Fees, $2.00. H., J. & E. pl'ff's att'ys.

32 UNITED STATES OF AMERICA, } ss:
Indian Territory, }

In the United States Court for the Indian Territory.

KINGMAN & COMPANY } No. —. Garnishment.
vs.
LYMAN FRIEND, Garnishee of W. H. Duncan. }

The President of the United States of America to the marshal of the Indian Territory, Greeting:

Whereas Kingman & Co., a corporation duly orga-ized and existing under and by virtue of the laws of the State of Illinois, on the 28th of September, A. D. 1889, sued out their certain writ of attachment against the property of one W. H. Duncan from the clerk's office of the United States court for the Indian Territory for the sum of nineteen hundred and ninety-four dollars and forty-two cents debt and thirty dollars costs of suit, which debt and costs it is alleged remains wholly unsatisfied, and it being represented by said plaintiff that Lyman Friend is indebted to the defendant and has goods, chattels, moneys, rights, credits, and effects in his hands and under his control belonging to the defendant, you are therefore hereby commanded to summons the said Lyman Friend to appear before the United States court for the Indian Territory on the first day of the April term, A. D. 1890, thereof, the same being the 7th day of April, A. D. 1890, then and there to answer what goods, chattels, credits, *chattels,* moneys, or effects he may have in
33 his hands belonging to said defendant to satisfy the said claim of Kingman & Co., and to answer such further interrogations as may then and there be exhibited against him, and hereof fail not.

[SEAL.] W. NELSON, *Clerk.*

33½ [Endorsed:] No. 535. Kingman & Co. *vs.* Lyman Friend, gar. of W. H. Duncum. Garnishment. Issued Oct. 3rd, 1889. Returnable April term, 1890. Filed Oct. 25th, 1889. Wm. Nelson, clerk. H., J. & E.

This writ of garnishment came to hand at Muscogee, I. T., Oct. 8th, 1889, and executed Oct. 12th, 1889, at Duncan store, on Beef creek, Pickens Co., Chickasaw nation, I. T., by reading this writ to the within named and delivering to him in person a copy of the same.

T. B. NEEDLES,
U. S. Marshal, Muscogee Dist., I. T.
By T. M. WRIGHT, *Dep't.*

Marshal's fees, $2.00.

31 UNITED STATES OF AMERICA, } ss.
Indian Territory, }

In the United States Court for the Indian Territory.

KINGMAN & COMPANY }
vs. } No. —. Garnishment.
J. J. SALTERS, Garnishee of W. H. Duncan. }

The President of the United States of America to the marshal of Indian Territory, Greeting:

Whereas Kingman & Co., a corporation duly organized and existing under and by virtue of the laws of the State of Illinois, on the 28th day of September, A. D. 1889, sued out their certain writ of attachment against the property of one W. H. Duncan from the clerk's office of the United States court for the Indian Territory for the sum of nineteen hundred and ninety-four dollars and forty-two cents debt and thirty dollars costs of suit, which debt and costs it is alleged remain wholly unsatisfied, and it being represented by said plaintiff that J. J. Salters is indebted to the defendant and has goods, chattels, moneys, rights, credits and effects in his control belonging to the defendant, you are therefore commanded to summons the said J. J. Salters to appear before the United States court for the Indian Territory on the first day of the April term, A. D. 1890, thereof, the same being the 7th day of April, A. D. 1890, then and there to answer what goods, chattels, moneys, credits, or effects he may have in his hands belonging to the said defendant to satisfy the said claim of Kingman & Co., and to answer such further interrogations as may there and then be exhibited against him, and hereof fail not.

35 Witness the Honorable James M. Shackelford, judge of said court, and the seal thereof, this 3rd day of October, A. D. 1889.

[SEAL.] W. NELSON, *Clerk.*

35½ [Endorsed:] No. 537. Kingman & Co. *vs.* J. J. Salters, gar. of W. H. Duncan. Garnishment. Issued Oct. 3d, 1889. Returnable April term, 1890. Filed Oct. 25, 1889. Wm. Nelson, clerk. H., J. & E., pl'ff's atty's.

This writ of garnishment came to hand at Muscogee, I. T., Oct. 8, 1889, and executed Oct. 12, 1889, at Duncum's store, on Beef creek, Chickasaw nation, I. T., by reading to J. J. Salters this writ and delivering to him in person a copy of the same.

THOS. B. NEEDLES,
U. S. Marshal, Muscogee Dist., I. T.,
By T. M. WRIGHT, *Dep't.*

Marshal's fees, $2.00.

36 UNITED STATES OF AMERICA, } ss:
Indian Territory, }

In the United States Court for the Indian Territory.

KINGMAN & COMPANY }
vs. } Garnishment.
W. C. RANDOLPH, Garnishee of W. H. Duncan. }

The President of the United States of America to the marshal of the Indian Territory, Greeting:

Whereas Kingman & Co., a corporation duly organized and existing under and by virtue of the laws of the State of Illinois, on the 28th day of September, A. D. 1889, sued out their certain writ of attachment against the property of one W. H. Duncan from the clerk's office of the United States court for the Indian Territory for the sum of nineteen hundred and ninety-four dollars and forty-two cents debt and thirty dollars costs of suit, which debt and costs it is alleged remain wholly unsatisfied, and it being represented by said plaintiff that W. C. Randolph is indebted to the defendant and has goods, chattels, moneys, rights, credits, and effects in his hands and under his control belonging to the defendant, you are therefore hereby commanded to summons the said W. C. Randolph to appear before the United States court for the Indian Territory on the first day of the April term, A. D. 1890, thereof, the same being the 7th day of April, A. D. 1890, then and there to answer what goods, chattels, credits, moneys, or effects he may have in his
37 hands belonging to said defendant to satisfy the said claim of Kingman & Co., and to answer such further interrogations as may there and then be exhibited against him, and hereof fail not.

Witness the Honorable James M. Shackelford, judge of said court, and the seal thereof, this 3rd day of October, A. D. 1889.

[SEAL.] W. NELSON, *Clerk.*

37½ [Endorsed:] No. 534. Kingman & Co. *vs.* W. C. Randolph, gar. of W. H. Duncan. Garnishment. Issued Oct. 3rd, 1889. Returnable April term, 1890. Filed Oct. 25th, 1889. Wm. Nelson, clerk. H., J. & E., pl'tf'f's att'y's.

This writ of garnishment came to hand Oct. 8th, '89, at Muscogee, I. T. I certify I executed same by reading to W. C. Randolph this writ and delivering him a copy of same in person Oct. 12th, 1889.

THOS. B. NEEDLES,
U. S. Marshall, Muscogee Dist., I. T.
By T. M. WRIGHT, *Dept.*

Marshall fees, $2.00.

38	2 pr. men's pants	85	80..	811 60
	3 " " "	6	60..	19 80
4	pr. men's pants	3	00..	20 00
5	" " "	3	50..	17 50
2	" " "	2	70..	5 40
2	" " "	2	60..	5 20
2	" " "	3	25..	6 50
4	" " "	3	50..	14 20
4	" " "	3	00..	12 00
6	" " "	4	00..	24 00
5	" " "	4	30..	21 50
5	" " "	2	00..	10 00
10	" " " linen	1	10..	11 00
7	" coats	8	50..	59 50
11	" "	6	00..	66 00
10	" "	4	50..	45 00
12	" vests	3	00..	36 00
5	boys' suits	4	80..	24 40
4	" "	1	52..	6 08
5	" vests	1	25..	6 25
1	" coat		.....	2 12
9	men's wool shirts	1	10..	9 90
3	" " "		70..	2 10
3	" " "	1	00..	3 00
12	" coat and vest, costucker	1	25..	15 00
3	" " " wool & cotton	4	50..	13 50
3	pr. men's boots	2	60..	7 80
7	" " "	2	50..	17 50
2	" " shoes	1	65..	3 30
57	" " boots	4	12..	234 89
3	" " "	2	02..	6 06
2	" " "	2	00..	4 00
12	" " "	1	23..	14 76
6	" " "	1	14..	6 84
6	" " "	1	27..	7 62
4	" " brogans		86..	3 14
1	" " boots		.....	2 60
1	" " shoes		.....	1 77
4	" lad. brogans	1	38..	5 52
6	" children's shoes	1	17..	7 02
2	" ar-ties	1	00..	2 00
11	" ladies' brog's	1	20..	13 20
1	" " shoes		.....	2 00
2	" " sl'p's	1	00..	2 00
5	" miss. "	1	75..	8 75
24	musket bars		30..	7 20
9	shawl straps		20..	1 80
3	cts. brushes		40..	1 20
10	doz. gaming cards	1	20..	12 20
12	ladies' corsets		55..	23 10
25	lbs. knitting yarn		60..	15 00

6	lbs.	Saxony wool	72..	4 32
1		clock	.....	4 41
37		brok. pckgs. buttons	.....	5 00
		6 doz. l'd's' collars	1 00..	6 00
39		5 ladies' sets collars & cuffs	15..	75
		2½ doz. rickrack	85..	2 12
13		l'd's' lace collars	11..	1 43
44	yds.	bl'k lace	22..	4 84
22	"	" "	05..	1 10
170	"	" "	05..	8 50
7	prs.	miss. hose	34..	2 38
22	"	ch'ld's "	13..	2 86
8	"	l'd's' "	27..	2 16
17	"	ch'ld's "	09..	1 53
10	"	inf'ts' "	08..	80
8	"	Mrs.' "	21..	1 68
1	pkg.	lead pencils	.....	10
12	prs.	suspenders	10..	1 20
1	"	"	30..	1 20
4	"	"	13..	50
1	"	"	.....	22
2	"	"	14..	28
8	"	"	17..	1 36
8	"	"	21..	1 65
4	"	"	14..	56
8	"	"	09..	72
6		Rattlesnake Jack desperado hats	25..	1 50
8		what-you-call-ems	20..	1 60
5	bxs.	lamp wicks	20..	1 00
1	gre.	" "	.....	60
3	pkgs.	note paper	.....	60
6		day books	45..	2 70
5		fancy hat bands	30..	1 50
4	rolls	fancy ribbon	15..	6 75
1		ladie's riding saddle	.....	14 00
2		bridles	1 10..	2 20
3	"		1 20..	3 60
1	"		.....	75
11	prs.	harness brst. straps	1 10..	12 10
5		horse-collar pads	20..	1 00
4		halter straps	54..	2 76
2	pr.	bridle reins	60..	1 20
1	"	saddle riders	.....	2 00
3		hrg. leg pistol saberts	49..	1 47
3	prs.	harness tugs	2 00..	6 00
1		halter	.....	60
7	pr.	leggins	.....	6 00
9		baskets	08..	72
3	pr.	stirrup straps	1 52..	5 30
2		men's hats	2 58..	5 16
8	"	"	2 00..	16 00

4	men's hats	2 92	11	68
2	" "	2 92	5	84
1	" "		2	50
2	" "	2 92	5	84
3	" "	3 57	10	71
1	" "		3	50
2	" "	3 65	7	30
2	" "	3 00	6	00
4	" "	3 00	12	00
	1 man's hat		3	45
40	1 men's hat		1	85
	2 " "	3 75	7	50
4	men's hats	3 75	15	00
1	" "		5	50
1	" "		3	00
4	" "	4 50	18	00
2	" "	4 50	9	00
2	boys' "	1 00	2	00
1	" "			52
1	man's "		2	65
3	" "	1 50	4	50
1	boy's "			67
2	men's "	60	1	20
1	" "			32
1	" "	95	3	80
3	" "	1 60	4	80
6	prs. men's buck. gloves	1 45	8	70
3	" " " "	1 50	4	50
5	" " " "	1 00	5	00
8	" " " "	1 15	9	20
6	" " " "	50	3	00
6	" " " "	1 00	6	00
4	" boys' " "	35	1	40
1	" ladies' " "			75
4	" gents' " "	10		40
2	" ladies' " "	1 10	2	20
5	" ear muffs	09		45
1	" lad's fur cap		1	00
8	" white gloves	10		80
18	" husking "	1 00	18	00
28	" " "	85	23	80
1	lad's jers-y		2	00
2	" "	78	1	56
7	" "	1 00	7	00
4	" "	50	2	00
3	men's overcoats	9 91	29	70
3	" "	11 00	33	00
3	" "	8 90	26	70
5	boys' overcoats	5 75	28	75
1	" "		6	30
3	" "	6 82	20	46

1 duck coat	.....		1 70
10 doz. glass tumblers	44..	4	40
2½ " " "	64..	1	60
2 " " "	64..	1	28
2 " " "	64..	1	28
1 " " "	.....		80
6 butter dishes	09..		54
2 " "	18..		36
2 glassware	70..	1	40
12 sugar stands	13..	1	56
2 " "	13..		26
5 syrup cans	30..	1	50
11 butter dishes	15..	1	65
1 table castor	.....		40
3 pkl. dishes	05..		15
1 lot queensware	.....	2	00
3 butter dishes	15..		45
41 5 glass sets	30..	1	50
6 queensware pitchers	35..	2	10
1 glass pitcher	.....		55
11 large coal-oil lamps	75..	9	25
5 ten-inch augers	75..	3	75
6 " "	52..	3	30
2 ¾-inch augers	35..		70
1 bit	.....		30
6 ½-inch augers	13..		78
3 frogs	60..	1	80
2 "	30..		60
12 gimlets	03..		36
3 rasps	35..	1	05
8 sml. files	11..		88
6 " "	11..		66
4 in. squares	20..		80
3 saw sets	25..		75
6 lamp burners	07..		42
3 screw-drivers	11..		33
4 "	16..		64
1 set table knives and forks	.....	1	20
4 " " " " "	1 20..	4	80
5 " " " " "	1 46..	7	30
10 " " " " "	1 55..	15	50
5 padlocks	15..		75
8 "	07..		56
5 "	10..		50
2 drawknives	20..		40
6 punchers	02..		12
1½ snaps	09½.		13
7 "	07..		49
¼ gross hooks and staples	.....		18
¼ " " "	.....		18
5 hammers	52..	2	60

3 hammers		44..	1 32
3 whetrocks		12..	36
18 papers shoe tacks		20..	3 60
5 bx. carpet "		19..	95
1½ flat-head screws		.....	1 44
3 John Deer plow springs		20..	60
1 bridle bit		.....	50
9 German snaps		04..	36
6 prs. spurs		21..	1 26
2 " "		55..	1 10
12 swivels		03..	36
20 open links		.....	20
4 screw pulleys		07..	28
4 swivel "		11..	44
3 pt. brushes		10..	30
4 egg-beaters		25..	1 00
4 varnish brushes		20..	80
2 wht. "		35..	70
1 mirror		.....	50
4 buggy whips		36..	1 44
30 brooms		20..	6 00
4 hair s—		30..	1 20
	1 horse collar	.....	80
42	1 lt. bolts	.....	40
	1 hand corn-shuckers	12½	50
1 lot wagon bin. staples		.....	60
6 blk. brushes		15..	90
5 fluting irons		85..	1 25
3 pr. gate hinges		25..	75
8 auger handles		05..	40
5 iron wedges		.....	50
20 axes		.....	12 00
24 "		.....	14 40
2 smoothing irons		32..	64
11 steel traps		38..	3 08
4 ax handles		16..	64
10 mattock handles		12..	1 20
2 halter clamps		40..	80
2 horse brushes		50..	1 00
3 drawknives		63..	1 89
3 work-bench screws		37..	1 48
5 spit-oons		15..	75
2 slop sets		1 80..	3 60
36 Simmons' regulator		29..	10 84
11 " " "		58..	6 38
8 bot. wine cordial		74..	5 92
15 " chill —		55..	8 25
10 " buchu		55..	5 55
45 " ink		08..	3 60
13 " mucilage		06..	78
3 " wine of tar		66..	1 98

3 bot. neuralgia dissolver	1 00	1	00
1 " penetrating oil	.....		32
3 " king pain	15		45
28 pcks. liver medicine	14	2	92
2 bot. vermifuge	12½		25
3 " spre. gum	28		84
3 " cod oil	70	2	10
4 " blood srp	65	2	60
7 " rheumatic liniment	12½		87
2 " h'e'berry cord'l	35		70
8 " bl'ekb'ry balsam	14	1	12
2 " ague cure	37		74
2 " aromatic	17		34
34 bx. blacking	06	2	04
35 " "	03	1	05
6 bars stove polish	07		42
28 bot. Chts. chill tonic	50	14	00
98 pck. liver medc	50	49	00
31 box- healing salve	15	3	95
33 papers mac. needles	50	16	50
24 machine rubbers	02		48
12 " springs	03		36
4 " shuttles	55	2	20
9 box- bluing	05		45
8 bottles Donnel's ljnt	37	2	96
1 " " ag. cure	.....		60
8 " Jama-ca ginger	22	1	32
1 lb. prepared mercury	.....		54
1 bottle sugar lead	.....		33
43 13 box- cinnamon	05		65
10 bottles glycerine	08½		85
25 bottles calomel	11	2	75
12 " Godfrey's cordial	07		84
5 corn solvent	15		75
36 box- Donald's pills	14	5	04
1 " eye salve	16		64
3 bot. Carter's pills	33		99
10 box- pills	14	1	40
9 bot. hive syrup	09		81
11 " pictoral	07		77
6 " spicae	06		36
12 " pictoral	12	1	44
2 " hartshorn	07		14
6 " tct. arnica	08		48
17 " castor oil	15	2	55
8 " os. cinnamon	06½		52
2 " tct. iodine	07		14
4 " spt. niter	06		26
9 " chloroform	13	1	17
8 " oil spike	14	1	12
7 " bed-bug exter	14		98

5 pkgs. sage		05..	25
5 " hops		10..	50
13 box- 45-cal. cartridges		56..	6 58
5 bot. Summer's cord'l		40..	2 00
18 buckets bk. powder		55..	9 90
21 cans " "		24..	4 31
21 " " "		13..	3 12
46 " " "		14..	6 44
12 " " "		14..	1 68
94 " " "		08..	7 52
23 " " "		04..	92
4 buckets " "		55..	2 20
27 cans condensed milk		16..	4 32
1 lot mustard		.....	30
1 lot mustard		32..	56
1¾ lbs. cinnamon		.....	72
1 jar borax		05..	25
5 lbs. rosin		02..	16
8 ox. sulphate zinc		05..	27
5½ lbs. sulphur		.....	05
1 " salts		12..	24
2 " borax		10..	1 00
10 fruit jars		3 16½.	36 66
10 box- cigars		1 29..	10 32
8 " "		.....	2 50
3 " broken		02..	88
11 books cigarette paper		31..	2 48
8 lbs. chewing tobacco		56..	5 04
9 " smoking "		52..	4 68
9 " " "		62½.	1 25
2 razors		75..	2 25
3 "		30..	1 20
4 " straps		12..	48
4 " brushes		20..	60
3 hair "		08..	32
4 tooth brushes		05..	20
44 4 fish hooks and lines		08..	64
8 bunches fish "		05..	35
7 bunches fish lines		10..	20
2 boxes " hooks		06..	36
6 combs		08..	32
4 "		05..	45
9 "		07½.	38
7 school companions		02..	42
21 lead pencils		24..	1 32
8 doz. "		1 33..	2 66
2 deer-foot knives		1 00..	2 00
2 pocket "		60..	2 40
4 " "		50..	2 00
4 " "		40..	1 60
4 " "		45..	90
2 " "			

4 pocket knives	80..	3 20
1 " "	.....	90
3 " "	70..	2 10
3 " "	50..	1 50
1 " "	.....	55
6 butcher "	35..	2 10
4 prs. scissors	22..	88
2 " "	24..	48
6 tweezers	05..	30
29 thimbles	04..	1 16
10 key rings	02½	25
12 fiddle bridges	02¼	27
5 rubber erasers	08½	42½
3 pencil-sharpeners	06..	18
3 ladies' hat pins	02..	06
1 doz. pants' buckles	.....	10
29 fiddle strings	05..	1 49
17 " "	10..	1 70
6 " "	05..	30
8 sets knit needles	04..	32
28 papers "	04..	1 12
5 rolled-gold breast-pins	18..	90
2 scarf-pins	17..	34
3 prs. cuff-but.	10..	30
4 " spectacles	17..	68
3 spectacle cases	11..	33
8 finger rings	60..	4 80
11 " "	30..	3 30
3 crochet needles	03..	09
32 bottles cologne	13..	4 16
4 " "	13..	52
2 " Bars' oil	14..	28
8 flakes fancy soap	07..	56
12 " " "	04..	48
11 " " "	05..	55
3 " " "	06..	18
8 box tooth powder	.....	1 12
1 swan's down	.....	1 00
20 box lily white	15..	3 00
1 lot corset laces	.....	.....
4 prs. gents' garters	18..	72
45 7 prs. ladies' garters	06..	42
8 yds. elastic	05..	40
12 ladies' belts	12..	1 44
4 " small scarfs	12..	48
13 portmanteaus	.....	1 43
33 pen stocks	02..	66
8 gents' scarfs	20..	1 60
1 " tie	.....	20
7 yds. embroidery	13..	91
563 spools thread	.....	20 10

238 prints	06..	14	28
2 pr. hose	10..		20
8 " "	10..		80
3 " "	20..		60
9 " "	10..		90
68 yds. lone star flannel	20..	13	60
17 " " " "	18..	3	06
40 " " " "	23..	9	20
30 " " " "	16..	4	80
50 " red flannel	28..	14	00
12 " " "	35..	4	20
22 " " "	23..	5	06
3 " " "	21..		63
18 " " "	21..	3	98
27 " " "	20..	5	40
23 " " "	26..	3	90
22 " canton flannel	20..	4	40
87 " " "	11..	9	77
51 " " "	10..	5	10
15 " " "	08..	1	20
4 " " "	09..		36
31 " " "	11..	3	41
13 " drill	08..	1	04
58 " linsey	12..	6	96
4 " table linen	37..	1	48
20 " " "	43..	8	60
26 " toweling	08..	2	08
6 " "	10..		60
11 pairs towels	56..	6	16
3 " "	15..		45
11 napkins	05..		55
31 cheviots	07½..	2	66
33 costume cloth	08..	2	64
37 " "	08..	2	96
12 " "	09..	1	08
8 yds. chambray	22..	1	76
4 " "	18..		72
4 " gingham	08..		32
1 lot remnants	.....		25
4 toboggans	30..	1	20
7 "	15..	1	05
2 corn-crushers	.....	128	00
3 wagon scales	.....	180	00
1 store building, 20 x 46, and 2 side rooms	.....	350	00
5 show-cases	.....	25	00
2 long counters	.....	25	00
46 2 short counters	.....	15	00
2 p'r platform scales	.....	10	00
1 p'r platform scales	.....	10	00
1 stove	.....	5	00
7 thread cases	.....	20	00

Shelving	.....		40 00
2 breaking plows	.....		15 00
1 oil tank	.....		5 00
14 scoop shovels	93..	13	02
5 old scoops	30..	1	50
7 wagon br	15..	1	05
1 lot spokes and fellows	.....	5	00
1 D steel-beam plows	.....	12	87
7 14 Western Queen plows	16 09..	112	63
7 D 2 steel-beam "	12 87..	90	09
5 D 16 " "	14 65..	73	25
15 plow-shares	2 50..	37	50
4 large wash tubs	74..	2	96
5 small "	55..	2	75
1 piece rope	.....		60
1 money safe	.....	8	00
1 work bench screw	.....		50
4 iron "	75..	3	00
5 plow-shares	2 50..	12	50
3 kettles	46..	1	38
3 frying pans	15..		45
4 stove shovels	08..		32
1 mattock	.....		50
3 grub hoes	50..	1	50
4 gal. castor oil	1 69..	6	76
3 scoops	93..	2	79
50 lbs. rice	05..	2	50
2 corn mills	7 32..	14	64
19 lbs. cotton batting	08..	1	52
4 sets plates	46..	1	84
14 sets cups and saucers	40..	5	60
6 platters	57..	3	42
4 "	46..	1	84
1 "	.....		16
1 oil tank	.....	2	00
1 bird trap	.....	1	50
2 strainers	09..		18
4 dippers	07..		28
1 oil can	.....		37
1 "	.....		40
1 lantern	.....		75
1 tin bucket	.....		48
5 teapots	39..	1	95
8 flesh forks	05..		40
5 lbs. tea	45..	2	25
6 " powder	22..	1	54
6 " starch	04..		24
40 " grindstone	03..	1	20

47 KINGMAN & COMPANY } Suit Pending in the U. S. Court for
vs. the Indian Territory, at Musko-
W. H. DUNCUM. } gee, I. T.

Now, at this time, comes James Rennie, Samuel Paul, S. M. Huntly, S. M. White, and J. J. Salters, all of whom reside in the Indian Territory.

First, and for interplea herein, allege and show to the court that the property levied upon by virtue of the order of attachment issued herein, consisting of general stock of merchandise, some scales and other property, a description of which is given in the marshal's return of the said order, and reference is made to the same, which is on file among the papers of the above cause, for a more complete description of said property, is and was at the time of said levy subject to a valid subsisting lien on the same for more than the worth of such property.

Second. That on the 27th day of July, A. D. 1889, the said Huntly, White, Paul, and Rennie were sureties for the said defendant, Duncum, on three promissory notes payable to Stevens and Hemming, one for $1,500, dated April 22, 1889, and due August 1st, 1889, signed by Duncum, White, & Rennie; one for $2,500, dated May 31st, 1889, due August 1st, 1889, signed by Duncum, Paul, & Rennie; one for $5,165, dated July 18th, 1889, due June 1st, 1890, signed by said Duncum and Huntly, each and all of which bear interest and provide for payment of attorneys' fees, and are fully described in a copy of a deed of trust given to secure the sureties on the same, hereto attached, marked Exhibit A, and made a part of this

48 plea. On the said 27th day of July, 1889, the said Duncum, recognizing that the other parties above named were his accommodation sureties on said notes, and for the purpose of securing and saving his said sureties harmless from costs, did on said date make, executed, and delivered to the said J. J. Salters, as trustee, that certain deed of trust, a copy of which is hereto attached, marked "A."

Third. That immediately after the execution of said deed of trust the said Salters, at the instances of the said beneficiaries in the same, took absolute actual possession of the said property mentioned in said deed and tried upon in this cause, and began the discharge of his duties as such trustee, and had advertised the property for sale, and had procured a buyer for the same at its full, fair cash value at the time the levy was *made* upon the same as aforesaid, which levy stopped the said sale. At the time of the said levy said trustee was in the actual possession of said property under said deed, and the pl'ffs and the officer that made the levy were notified and well aware of that fact before the levy was made; that the above said notes are still unpaid and are valid subsisting claims against the said Duncum and his said sureties, and the said deed of trust is a valid subsisting lien upon said property to secure the parties aforesaid.

Fourth. Said property is not worth and will not sell for sufficient to pay said lien, or anyways near that amount, and cannot

be sold for more than $2,500. The holding of the same by the marshal/ or sale of the same by him will necessarily be at-
49 tended with much loss and at great costs; that the said trustee can handle said property and sell the same to much better advantage than the marshal/ can, and at much less costs.

Wherefore said sureties and the said trustee pray the court for order restoring the said trustee to the possession of said property that he may execute the said trust upon his giving such bond as the court may require to protect any supposed interest the plaintiffs may have under said levy, or that the trustee be ordered to sell the goods under the power in said deed, and to deposit the proceeds in court, to abide the decision of the court as to the rights of the parties.

POTTER, POTTER & EDLEMAN,
Att'ys for Interpleader.

S. M. HUNTLEY.
J. J. SALTER.
S. M. WHITE.
JAMES RENNIE.

KINGMAN & COMPANY } Interpleader of S. M. Huntley, Samuel
vs. Paul, James Rennie, S. M. White, J. J.
W. H. DUNCUM. } Salter.

Sworn to and subscribed before me this twenty-ninth day of October, A. D. 1889.

[SEAL.] ALBERT RENNIE.
Commissioner U. S. Circuit Court for the District of Kansas.

50 EXHIBIT "A."

THE STATE OF TEXAS, }
County of Cooke. }

KNOW all men by these presents that I, W. H. Duncan, a resident of the Indian Territory, for and in consideration of the sum of ten dollars paid by J. J. Salters, the receipt of which is hereby acknowledged, have sold and by these presents do sell, transfer, convey, and confirm unto the said J. J. Salters, and to his successor in this trust, the following-described property, to wit:

The store house now owned and occupied by the said W. H. Duncan at Beef Creek, in the Indian Territory, the fixtures therein, and all goods, wares, and merchandise contained in said house, and the books, notes, and accounts of said W. H. Duncan in said business as a general merchant at Beef Creek, I. T.; also all cattle and horses now owned by him at said Beef Creek, together with all and singular the rights and appurtenances to the same in any manner belonging or appertaining; to have and to hold all and singular the property above described unto the said J. J. Salter or substitute for.

This conveyance, however, is intended as a trust for the better

securing of S. M. Huntley, Samuel Paul, S. M. White, and James Rennie against the payment of these promissory notes of which I am principal, and which, as hereinafter shown, they signed as sureties, which said notes are as follows:

51

First.

GAINESVILLE, TEXAS, *April* 22, 1889.

On August 1st, 1889, after date, we promise to pay to the order of Stevens and Hemming fifteen hundred and fifty dollars, for value received, payable at the Gainesville National bank, Gainesville, Texas, with interest from maturity until paid at the rate of 12 per cent. per annum, with 10 per cent. attorneys' fees additional if collected by law.

$1,550. (Signed) W. H. DUNCAN.
S. M. WHITE.
JAMES RENNIE.

Second.

GAINESVILLE, TEXAS, *May* 31, 1889.

On August 1st, 1889, after date, we or either promise to pay to the order of Stevens and Hemming twenty-five hundred dollars, at the Gainesville National bank, Gainesville, Texas, for value received, with interest at the rate of 12 per cent. per annum after maturity until paid, with 10 per cent. attorneys' fees additional if collected by law.

$2,500. (Signed) W. H. DUNCAN.
SAMUEL PAUL.
JAMES RENNIE.

Third.

GAINESVILLE, TEXAS, *July* 18, 1889.

On June 1st, 1890, after date, we or either of us promise to pay to the order of J. R. Stevens five thousand one hundred and sixty-five dollars, at the Gainesville National bank, Gainesville, Texas, for value received, with interest at the rate of 10 per cent. per annum after date until paid, with 10 per cent. attorneys' fees addi-
52 tional if collected by law.

$5,165. (Signed) W. H. DUNCAN.
S. M. HUNTLEY.

Upon payment of which said promissory notes according to their face and tenor being well and truly made, then in such case this conveyance is to become null and void and shall be released, cost of said W. H. Duncan; but in case of failure or default of payment of said notes when they shall respectively become due, or either of them, then the other of said notes shall be deemed due and payable; and in such event the said J. J. Salters is, by these presents, fully authorized and empowered, and it is made his special duty upon request of either or all the aforesaid beneficiaries herein at any time made after default as aforesaid, to sell the above-described property

to the highest bidder for cash in hand—selling at public or private sale, in bulk or retail, with or without advertisement as may seem to said trustee or his substitute best; and after said sale shall make the necessary conveyance of the property so sold and the proceeds of said sale shall pay to the aforesaid beneficiaries herein in proportion to the respective amounts for which each may be surety at the time of said sale, as evidenced by the above notes and the payments that may be made thereon in which notes all signing are sureties, except W. H. Duncan, and shall pay the expense of this trust, including a commission of 5 % to the trustee acting hereunder, holding the remainder subject to the order of the said W. H.
53 Duncan. It is hereby especially provided that should the trustee named herein from any cause whatever fail or refuse to act or become disqualified from acting as such trustee, then, the beneficiaries aforesaid, S. M. Huntley, S. M. White, Samuel Paul, and James Rennie, shall have full power to appoint a substitute, in writing, who shall have the same power as trustee hereinbefore named, and I, by these presents, ratify and confirm any and all acts which said trustee or substitute may do hereunder.

Witness my hand this 27th of July, 1889.

W. H. DUNCAN.

Exhibit A.

[Endorsed:] No. —. Kingman & Co. *vs.* W. H. Duncan. Interpleader of Huntly, Rennie, Salter, Paul, and White. Setting up lien upon property levied upon. Filed Nov. 4th, 1889. Wm. Nelson, clerk.

54 In the United States Court for the Indian Territory, Session at Muskogee, I. T.

KINGMAN & COMPANY *vs.* W. H. DUNCUM. } No. —.

Now comes James Rennie, S. M. White, Samuel Paul, S. M. Huntley, and J. J. Salters, and, after obtaining leave of the court for that purpose, files this their interplea in said cause and alleges and shows to the court that they and each of them reside in the Chickasaw or Choctaw nations, in the Indian Territory.

That the said S. M. White and James Rennie are the sureties of the defendant W. H. Duncum on a note dated April 26th, 1889, payable to Stevens & Henning and due August 1st, 1889, for fifteen hundred and fifty dollars, with interest; said note fully described in the copy of a deed of trust given to secure the said sureties in the payment of the same, which is hereto attached, marked Exhibit "A," and made a part of this plea. The said Samuel Paul and James Rennie are likewise the sureties of the said defendant Duncum on a note dated May 31st, 1889, due August 1st, 1889, payable to Stevens & Henning for the sum of twenty-five hundred dollars, with interest; the said note fully described in said Exhibit "A;" that the said

Huntley is also surety for the defendant Duncum on a note dated July 18th, 1889, due June 1st, 1890, payable to the order of J. K. Stevens, fifth-one hundred and sixty-five dollars, with interest, as the other notes; all of which are fully described in said Exhibit "A."

55 That the said White, Paul, Huntley, and Rennie, are accomodation sureties for the said defendant upon the notes above set forth, and *the* order to secure them against loss or damage by reason thereof the said Duncum, on the 27th day of July, 1889, made, executed, and delivered to the said Salters, as trustee, a deed of trust, a copy of which is attached hereto as aforesaid and to which reference is here made for the term and provision of the same, as well as a fuller description of said note and the property conveyed therein.

Second. That said notes have never been paid, but are still due and owing according to their face and tenor.

Third. After the execution of said deed of trust the said Salters took absolute possession of the property described in said deed of trust, and was in such possession, management, and control of the same at the dates and time hereinafter mentioned, the said Duncum having surrendered to the said trustee the possession of said property after the execution of said deed of trust.

Fourth. On or about the 9th day of October, 1889, and while the said trustee, Salters, was in such actual possession of said property under the provisions of said deed of trust, performing his duty as trustee as therein provided, the property was levied upon and seized by the marshal of said Indian Territory by virtue of an order of attachment issued in the above cause against the defendant Duncum.

Now, the said property described in said deed of trust and so levied upon by virtue of said order of attachment is not worth

56 near sufficient to pay the lien thereon as herein set forth, the same not being of greater value than about three thousand dollars; that the plaintiffs and the said officers well knew of said deed of trust, and that the same was a lien on said property prior to the levy of said order upon the same. The said property is held at great expense, and if not released will soon be entirely sacrificed. The trustee has an opportunity to dispose of said property for a fair valuation, and they show that all of these interpleaders are solvent.

Wherefore they pray the court for an immediate order authorizing the said trustee to proceed with the performance of his duty, as trustee under the terms contained in said deed, to sell said property and hold the proceeds thereof until the further order of the court; or if the court should desire more securities, then they pray for such order, and that said trustee deposit the proceeds with the clerk of this court, or that he give such security for the same as the court may require until further order, and for all such necessary relief as they may be entitled to, for costs and general relief.

POTTER, POTTER & EDDLEMAN,
Att'ys for Interpleaders.

I, James Rennie, on oath say that the matters and things above set forth are true in substance and in fact.

JAMES RENNIE.

Sworn to and subscribed before me this Dec. 9th, 1889.

[SEAL.] ALBERT RENNIE,
Commissioner U. S. Circuit Court for District of Kansas.

[Endorsed:] No. 531. Kingman & Co. *vs.* W. H. Duncum. Interplea of Huntley, Rennie, Paul, White, and Salters. Filed Dec. 16th, 1889. Wm. Nelson, clerk.

57 KINGMAN & COMPANY
vs.
W. H. DUNCAN, Defendant, and JAMES RENNIE *et al.*, Interpleaders. } No. 531.

This day coming on to be heard the application for an order to sell the property attached in this cause, counsel for the plaintiff and interpleader consent to the following order:

It is ordered by the court that the marshal*l* sell at private sale the property attached in this cause to the best advantage, and that the trustee, J. J. Salter, join in said sale so as to pass the unincumbered title to said property, and that the marshal*l* hold the proceeds subject to the order of this court.

I hereby certify that the above and foregoing is a full, true, and complete copy of the order of court in the above-entitled cause this 17th of Dec., A. D. 1889.

[SEAL.] WM. NELSON, *Clerk*,
By R. W. SHACKELFORD, *Deputy*.

T. M. Wright, deputy, will execute this order remitting proceeds to me.

T. B. NEEDLES,
U. S. Marshall.

58 This order of sale came to hand at Muscogee, I. T., and executed at Beef Creek, Chickasaw nation, I. T., Jan. 21, 1890. In obedience to the within order of sale we have sold and delivered Sam. Garovine Jan. 21, 1890, for the sum of $2,010 cash, lawful money of the United States, to me paid in hand by the above-mentioned Sam. Garovine, which I now hold subject to the order of the United States court at Muscogee, I. T.

THOS. B. NEEDLES,
U. S. Marshal for the Muscogee Dist., I. T.,
By his dep'y, THOS. M. WRIGHT.

[Endorsed:] 531. Returned to clerk's office Feb. 7th, 1890. Thos. B. Needles.

Marshall's Cost.

Service	2 60
279 miles	16 20
2 per cent	80 60
	$858 20

Filed Feb. 7th, 1890.

WM. NELSON, *Clerk.*

59 UNITED STATES OF AMERICA, } ss.:
Indian Territory, }

In the United States Court for the Indian Territory.

KINGMAN & COMPANY, Plaintiff. } Affidavit of Garnishee.
against
W. C. RANDOLPH, Garnishee of W. H. Duncum. }

W. C. Randolph, garnishee in the above-entitled case, states that he is not indebted to the said W. H. Duncum in any sum whatever, and was not at the time said garnishment was served upon him, and is not now; that he has no property, money, or effects of any kind in his possession belonging to said Duncum, and did not have when said writ of garnishment was served upon him. He denies that he has, or had at date of service of said writ, any goods, chattels, monies, rights, credit, or effect belonging to said Duncum, or that he now has, and asks to be hence dismissed with the costs and expenses in this behalf expended.

W. C. RANDOLPH.

Subscribed and sworn to before me this 4th day of April, A. D. 1890.

[SEAL.] JAMES W. HOCKER,
Commissioner of U. S. Circuit Court for said District.

60 [Endorsed:] No. 531. Kingman & Co., pl'tiff, against W. C. Randolph, garnishee of W. H. Duncum. Answer of garnishee. Filed April 9th, 1890. Wm. Nelson, clerk.

61 In the United States Court for the Indian Territory.

KINGMAN & COMPANY, Plaintiffs. }
vs.
W. H. DUNCUM, Defendant. }

And now comes the plaintiff herein and demurs to the interplea of James Rennie, S. M. White, Samuel Paul, S. M. Huntley, and J. J. Salters and, for cause of demurrer, says that said interplea does not contain facts sufficient to constitute a cause of action or to show that said interpleaders are entitled to the relief demanded.

Wherefore plaintiffs pray that said interplea may be dismissed, and that plaintiffs may have their costs.

HINDS & JACKSON,
Att'ys for Plaintiffs.

[Endorsed:] No. 531. Kingman & Co. *vs.* W. H. Duncum, defendant. Demur to interplea. Filed May 17, 1890. Wm. Nelson, clerk. Hind- & Jackson, att'ys for plaintiff.

62 In the United States Court for the Indian Territory.

KINGMAN & COMPANY, Plaintiff,
vs.
W. H. DUNCUM *et al.*, Defendants. } No. 531.

And now comes the plaintiff, Kingman & Co., and, for answer to the interplea of James Rennie, S. M. White, Samuel Paul, S. M. Huntley, and J. J. Salters, *and* denies that said interpleaders have any right or interest in the personal property levied upon by the United States marshal in this action, and further denies that the notes hereinafter described as being and purporting to be signed by the said beneficiaries were signed by them as sureties. Plaintiff denies that W. H. Duncum was indebted to said beneficiaries or to Stevens & Hemming in the amounts and sums mentioned in said notes.

Plaintiff further says that said notes are illegal and void for the reason that the whole transaction, trades and subject of settlement of business between the Bank of Gainesville and Stevens & Hemming and the defendant W. H. Duncum, was had in the Indian Territory, and all the property affected and disposed of between said parties was in the Indian Territory, and that said notes contains an illegal rate of interest, to wit, 12 per cent., and attorneys' fees of 10 per cent.

Plaintiff further denies that said Duncum, defendant, received any consideration for said notes whatever.

63 Plaintiff denies that the said parties named in the interpleader as beneficiaries were accommodation indorsers or sureties for the said W. H. Duncum, but, if liable at all on said notes, were liable as principals and makers.

Plaintiff further denies that the instrument termed by said interpleaders as a trust deed is valid in law or gave to said interpleaders any right, title, or interest in or to the property attached by the marshal and held in this action, but alleges the truth to be that said instrument was made voluntary by the said W. H. Duncum for the purpose of placing all of his property beyond the reach of his creditors and to hinder and delay them in the collection of their debts, and that said instrument is void in law and of no effect and gives to said interpleaders no right or interest in said goods and property.

Plaintiff denies that said J. J. Salters was acting for the beneficiaries named in said instrument, but avers the truth to be that the said J. J. Salters was a clerk of the said W. H. Duncum and was assisting him in fraudulently disposing of his property to hinder and delay his creditors in the collection of their debts.

Plaintiff denies that the said J. J. Salters took absolute possession of said goods for the purpose of paying the creditors of said W. H.

Duncum out of the proceeds of the sales of said goods, but for the purpose of protecting them from the creditors of said W. H. Duncum and in the interest of said W. H. Duncum, and that he so held them at the time of the levy of the attachment by the U. S. marshal in this action.

64 Plaintiff further denies the allegation in the interplea of said parties, to wit, that said property is not near sufficient to pay the liens thereon as set forth, and that the same is of no greater value than about three thousand dollars, but alleges the truth to be that by said instrument the said W. H. Duncum conveyed to the said J. J. Salters property, notes, and accounts to the full value of eight thousand nine hundred and twenty-four dollars and fifty-two cents, and that all of said property, except what has been levied upon in this case, is now in the hands of J. J. Salters and said interpleaders; that a full, true, and correct copy of the notes referred to and the instrument or deed of assignment is hereto attached and made a part hereof the same as if the same had been written out when the same was referred to.

Wherefore plaintiff prays that they may be allowed to sell said property on their attachment and apply the proceeds to the satisfaction of their debt.

HINDS & JACKSON AND GALLUT,
Att'ys for Plaintiff.

65 STATE OF TEXAS, }
County of Cooke. }

Know all men by these presents that I, W. H. Duncum, a resident of the Indian Territory, for and in consideration of the sum of ten dollars paid by J. J. Salters, the receipt of which is hereby acknowledged, have sold and by these presents do sell, transfer, convey, and confirm unto the said J. J. Salters and to his successors in this trust the following described property, to wit: The storehouse now owned and occupied by the said W. H. Duncum at Beef Creek, in the Indian Territory, the fixtures therein, and all goods, wares, and merchandise contained in said house, and the books, notes, and accounts of said W. H. Duncum in said business, it being intended hereby to include all stock owned by said W. H. Duncum in his business as a general merchant at Beef Creek, I. T.; also all cattle and horses owned by him at said Beef Creek, together with all and singular the right and appurtenances to the same in any manner belonging or appertaining; to have and hold all and singular the property above described unto the said J. J. Salters or substitute forever. This conveyance is, however, intended as a trust for the better securing of S. M. Huntley, Samuel Paul, S. M. White, and James Rennie against the payment of three promissory notes on which I am principal and which, as hereafter shown, they signed as sureties; which said notes are as follows:

First.

GAINESVILLE, TEXAS, *April* 22, 1889.

On August, the 1st, 1889, after date, we promise to pay to the order of Stevens & Hemming fifteen hundred and fifty
66 dollars, for value received, payable at the Gainesville National bank, Gainesville, Texas, with interest from maturity until paid at the rate of 12 per cent. per annum, with 10 per cent. attorney's fees additional, if collected by law.

$1,550.00. (Signed) W. H. DUNCUM.
S. M. WHITE.
JAMES RENNIE.

Second.

GAINESVILLE, TEXAS, *March* 31, 1889.

On August the 1st, 1889, after date, we or either of us promise to pay to the order of Stevens & Hemming twenty-five hundred dollars, at the Gainesville National bank, Gainesville, Texas, for value received, with interest at the rate of 12 per cent. per annum after maturity until paid, with 10 per cent. attorney's fees additional, if collected by law.

$2,500.00. (Signed) W. H. DUNCUM.
SAMUEL PAUL.
JAMES RENNIE.

Third.

GAINESVILLE, TEXAS, *July* 18, 1889.

On June 1st, 1890, after date, we or either of us promise to pay to the order of J. R. Stevens five thousand one hundred and sixty-five dollars, at the Gainesville National bank, Gainesville, Texas, for value received, with interest at the rate of ten per cent. per annum after date until paid, with ten per cent. attorney's fees additional, if collected by law.

$5,165.00. (Signed) W. H. DUNCUM.
S. M. HUNTLEY.

67 Upon payment of which said promissory notes according to their face and tenor, being well and truly made, then in such case this conveyance is to become null and void, and shall be released at cost of said W. H. Duncum; but in case of failure or default of payment of said notes when they shall respectively become due, or of either of them, then the other of said notes shall be deemed due and payable, and in such event the said J. J. Salters is by these presents fully authorized and empowered, and it is made his special duty upon request of either or all the aforesaid beneficiaries herein at any time made after default as aforesaid, to sell the above-described property to the highest bidder, for cash in hand, selling at public or private sale, in bulk or in retail, with or without advertisement, as may seem to said trustee or his substitute best, and after said sale shall make the necessary conveyance of the property so sold, and the proceeds of the said sale shall pay to the

above-described beneficiaries herein, in proportion to the *pro*-spective amount for which each may be surety at the time of said sale as evidenced by the said notes, and the payment that may be made thereon, in which notes all signing are sureties except W. H. Duncum, and shall pay the expenses of this trust, including a commission of 5 per cent. to the trustee acting hereunder, holding the remainder subject to the order of said W. H. Duncum. It is hereby specially provided that should the trustee named herein from any cause whatever fail or refuse to act or become disqualified from acting as such trustee, then the beneficiaries aforesaid, S. M.
68 Huntley, S. M. White, Samuel Paul, and James Rennie, shall have full power to appoint a substitute, in writing, who shall have the same powers as the trustee hereinbefore named, and I by these presents ratify and confirm any and all acts which the said trustee or substitute may do hereunder.

Witness my hand this 27th July, 1889.

(Signed) W. H. DUNCUM.

Properly acknowledged.

J. F. Fortune, being duly sworn, on his oath says that he is the agent for the plaintiff in the above-entitled cause, who *are* absent from the Indian Territory, and that the statements contained in the foregoing answer are true, as he verily believes.

J. F. FORTUNE.

Subscribed and sworn to before me this 19th day of May, 1890.

WM. NELSON, *Clerk*,

By W. R. SHACKELFORD, *Deputy*.

[Endorsed:] No. 531. Kingman & Co. *vs.* W. H. Duncum. Answer to interplea. Filed May 19, 1890. Wm. Nelson, clerk. Hind & Jackson and Samuel C. Gallup, att'ys for pl'ff.

69 KINGMAN & COMPANY, Plaintiff,

vs.

W. H. DUNCUM *et al.*, Defendants.

We, the jury, find the issues between the interpleaders and the plaintiff in favor of the plaintiff.

W. W. HAYNES, *Foreman*.

70 In the United States Court for the Indian Territory, Holding Sessions at Muskogee, Indian Territory.

KINGMAN & COMPANY
vs.
W. H. DUNCAN, Defendant, and S. M. HUNTLEY, SAM. PAUL, S. M. WHITE, JAMES RENNIE, and J. J. SALTERS, Interpleaders. } No. 531.

Be it remembered that upon the trial of the above cause in the above court, on May 20th, 1890, and during April term, 1890, and

the matters and issues made between the said plaintiff, Kingman & Co., and the said interpleaders, viz., Huntley, Paul, White, Rennie, and Salters, the court charged the jury in effect to find for said plaintiffs against said interpleaders. And the interpleaders except to all that portion of said charges which holds that the instrument under which they claim, and a copy of which is attached to their interplea and the original of which was introduced in evidence, was not a mortgage or deed of trust. The language of that portion of said charge is as follows:

71 The instrument is wanting in several of the essentials of a deed of trust. In some of its features it is new and without precedent in the customs of conveying.

J. J. Salters, the so-called trustee, was not to have possession of the property, nor any part of thereof, except upon request of the said beneficiaries, at any time made after default in the payment of the notes or some one of them. Then and not till then was he to be authorized to take possession of the property and proceed to sell it in bulk or retail with or without advertising as said trustee might deem best; the trustee to make the necessary conveyance of the property so sold and the proceeds of such sale was not to be applied to the payment of the notes, but such proceeds were to be paid to the interpleaders—the sureties on the notes—in proportion to the respective amounts for which each might be surety at the time of such sale, as evidenced by said notes. The interpleaders were not creditors of the defendant Duncan; they were only sureties upon the several promissory notes, upon which notes neither of the interpleaders had paid anything.

The interpleaders further specially except to all that portion of said charge which holds said instrument to be of new and unusual character of instrument, and that the same upon its face reserved rights and interest to the grantor that made the instrument fraudulent upon its face, because no such rights or interest are reserved as effect the legal status of the instrument or make the same void or voidable.

The language of that portion of the charge is as follows:

"In this instrument the grantor Duncan reserves the surplus to himself, and the court instructs the jury that the reservation
72 of the surplus by a failing or insolvent grantor stamps the deed as constructively fraudulent. That such a reservation is as settled by the highest judicial authorities, the grantors preferring himself to *dissenting* creditors.

A failing or insolvent debtor can reserve no use or benefit to himself out of the property assigned or conveyed. He may stipulate for a release, but he must deliver the whole of his property not exempt by law to the judgment of all his creditors; not necessarily to the payment of all in equal proportions, for he may prefer such as — may elect, but the deed must provide for the distribution of any surplus that may remain in the hands of the trustee or assignee among his creditors. In this case there is a surplus reservation in favor of the grantor. It is in these words, to wit: "Holding the remainder subject to the order of the said W. H. Duncan."

The interpleaders except to all that portion of the charge to the jury wherein the court told the jury that — instrument under which interpleaders claim was null and void by reason of the facts stated in said instrument, because the instrument was a valid contract lien upon the property embraced in it, and the possession of the trustee, Salters, under the same, could not be interfered with. That portion of the court's charge read as follows:

"It has always been held that whatever trust of this character — that is, of the title to property by a failing or insolvent debtor — may be valid, any instrument which secures to the assignor any interest in or an unlimited control over the property con-
73 veyed and which has the effect of hindering or delaying creditors is void as being a fraud upon those creditors."

The interpleaders object to all of the charge of the court, a copy of which is hereto attached and made a part of this bill, because the same is not the law of the case.

And because the instrument sued upon was not the character of instrument the charge makes it; but is a plain, fair, honest deed of trust and so shows upon its face.

74 KINGMAN & CO. }
vs.
W. H. DUNCAN. }

This suit was brought by the plaintiffs, Kingman & Co., a corporation, against the defendant, W. H. Duncan, to recover an alleged indebtedness of one thousand nine hundred and ninety-four $\frac{75}{100}$ dollars, together with certain interests thereon, evidenced by two several promissory notes, which were executed and delivered by the defendant Duncan to the plaintiffs, Kingman & Co., of the 19th day of July, 1889, one of said notes being for the sum of one thousand dollars, to become due and payable on or before the 1st day of October, 1889, to bear interest at the rate of 10 per cent. per annum from maturity, and the other note for the sum of nine hundred and ninety-four $\frac{75}{100}$ dollars, to become due and payable on or before the 1st day of November, 1889, and also to bear interest at the rate of 10 per cent. per annum from maturity. It is further averred in the plaintiffs' complaint that the defendant Duncan had sold, conveyed, and otherwise disposed of his property, and suffered and permitted it to be sold with the fraudulent intent to cheat and defraud his creditors and to hinder and delay them in the collection of their debts, &c., &c.

The complaint was duly sworn to, and, upon the plaintiffs having executed the bond required by law, which bond was approved by the clerk of the court on the 28th day of September, 1889, a writ of attachment was duly issued against the property of the defendant Duncan, directed to and placed in the hands of the United States marshal of the Indian Territory, who thereafter levied the same, upon the personal property mentioned and described in his return on said writ of attachment.

Thereafter, to wit, on the 4th day of November, 1889, the
75 interpleaders herein, James Rennie, S. M. White, Samuel Paul, S. M. Huntley, and J. J. Salters, filed their interplea herein, alleging in substance that S. M. White and James Rennie were the sureties of the defendant W. H. Duncum on a certain promissory note dated April 22nd, 1889, payable on the 1st day of August, 1889, to the order of Stevens and Hemming, for the sum of $1,550.00, with interest; that said Samuel Paul and James Rennie were also the securities of the defendant Duncum on another certain promissory note dated May 31st, 1889, payable on the 1st day of August, 1889, to the order of Stevens and Hemming, for the sum of $2,500.00, with interest; that said Huntley was also the surety of the defendant Duncum on another certain promissory note dated July the 1st, 1889, payable June 1st, 1890, to the order of J. R. Stevens, for the sum of $5,155.00, with interest; that said White, Paul, Rennie, and Huntley were the accommodation endorsers of said defendant W. H. Duncum upon the several promissory notes *aforesaid* aforesaid; that in order to secure them against loss or damages as such endorsers said W. H. Duncum on the 27th day of July, 1889, made, executed, and delivered to the interpleader, J. J. Salters, as trustee, a deed of trust, a copy of which is attached and made a part of their interplea.

It is further averred that said notes have not been paid, but are still due and owing according to their face and tenor.

By said deed the defendant Duncum conveys to the said J. J. Salters and his successor in trust the storehouse then owned and occupied by the defendant at Beef Creek, in the Indian Territory; also the fixtures and all the goods, wares, and merchandise in said storehouse contained; also all the books, notes, and accounts of said defendant Duncum in said business as a general merchant at Beef Creek, Indian Territory; also all the cattle and horses then owned by him at Beef Creek, together with all and singular the rights and appurtenances to the same in any manner belonging; to have and to hold all and singular the property so described
76 unto said J. J. Salters and his substitute forever. Further this conveyance, however, is intended as a trust for the better securing of S. M. Huntley, Samuel Paul, S. M. White, and James Rennie against the payment of their promissory notes on which I am principal, and which as hereinafter shown they signed as sureties. "This is followed by the copies of said notes and these are the closing words of the instrument:" Upon the payment of which said notes according to their face and tenor being well and truly made, then and in such case this conveyance is to become null and void, and shall be released at the cost of said W. H. Duncum; but in case of failure or default of payment of said notes when they shall respectively become due or either of them, then the other of said notes shall be deemed due and payable; and in such event the said J. J. Salters is by these presents fully authorized and empowered, and it is made his special duty upon request of either or of all of the aforesaid beneficiaries herein at any time made after default as aforesaid to sell the above-described property to the

highest bidder for cash in hand, selling at public or private sale in bulk or retail, with or without advertisement, as may seem to said trustee or his substitute best, and after said sale shall make the necessary conveyance of the property so sold, and the proceeds of said sale shall pay to the above beneficiaries herein in proportion to the respective amounts for which each may be security at the time of said sale, as evidenced by the said notes and the payments that may be made thereon, in which notes all signing are sureties except W. H. Duncum, and shall pay the expenses of this trust, including a commission of 5 per cent. to the trustee acting hereunder, holding the remainder subject to the order of said W. H. Duncum. It is hereby specially provided that should the trustee named herein from any cause whatever fail or refuse to act or become disqualified from acting as such trustee, then the beneficiaries aforesaid, S. M. Huntley, S. M. White, Samuel Paul, and James Rennie, shall have full power to appoint a substitute in writing, who shall have the same power as the trustee here-
77 inbefore named, and by these presents ratify and confirm any and all acts which the said trustee or substitute may do hereunder.

Witness my hand this 27th day of July, 1889.

W. H. DUNCUM.

Such is the written instrument under which the interpleaders claim the property in controversy.

It is well-settled law both in this country and in England that "the court must in the first instance determine upon the legal effect of the written instrument, and if that be to delay creditors it must be rejected." This question was raised by the plaintiffs' demurrer to the plea of the interpleaders, but with the view of hearing the testimony and having the whole case before the court the demurrer was overruled, the plaintiffs answered the interplea, and now, the testimony having been adduced, the court will instruct the jury as to the law of the case.

In the opinion of the court the finding in the case, whether based upon the face of the instrument itself or in view of the evidence, must be in favor of the plaintiff. The instrument is wanting in several of the essential requisites of a deed of trust. In some of its features it is new and without precedent in the history of conveyancing. J. J. Salters, the so-called trustee, was not to have possession of the property nor any part thereof, except upon the request of the said beneficiaries at any time made after default in the payment of the notes or some one of them; then and not until then was he to be authorized to take possession of the property and proceed to sell it in bulk or retail with or without advertising, as said trustee might deem best, the trustee to make the necessary conveyance of the property so sold, and the proceeds of such sale were not to be applied to the payment of the notes, but such proceeds were to be paid to the interpleaders, the sureties on the notes, in proportion to the respective amounts for which each might be surety at the time of such sale as evidenced by said notes.

78 The interpleaders were not creditors of the defendant, Duncum. They were his sureties only upon the several promissory notes, upon which notes neither of the interpleaders had paid anything. Yet it is a fact, as shown by the evidence, that under this instrument, before either of said notes had matured, and before default in the payment thereof could have been made and before request on the part of the beneficiaries or either of them, the defendant, Duncum, himself went for and had the said J. J. Salters accompany him to Beef Creek, and the said Duncum then and there placed Salters in possession of the storehouse, goods, books, and accounts, and Salters, before he had seen or heard from said beneficiaries or either of them, took charge of the goods and proceeded to sell them. The court further instructs the jury that there was no valuable consideration passing from the interpleaders to the defendant, Duncum, such as to uphold the instrument relied upon. Further, that under the instrument, until default should have been made in the payment of some one of said notes, the defendant, Duncum, was to remain in possession of said property, goods, wares, and merchandise and proceed to sell the same as he had before done. The language used by the Supreme Court of the United States in the case of Means *vs.* Dowd, 128 U. S., as descriptive of that class of cases may be fittingly used in this case, namely:

All experience has shown how very common it is for failing and insolvent debtors who have any considerable means on hand, and especially in cases where a mercantile business of considerable value is going on, to delude themselves with the idea that if they can get time they can pay their debts; that if their creditors will delay until they can make such arrangements as they believe themselves capable of they will be able to pay everybody and even to save a considerable surplus out of their business. This delusion leads them to undertake to obtain this delay by means which the law does not sanction. If creditors refuse to extend time on their obligations and thus give them the delay which they deem
79 necessary, or if they fear to expose their condition to their creditors, they adopt, in many instances, the principle of making an absolute sale to certain friends who will settle up their affairs and return to them any surplus, or they make assignments or deeds of trust conveying the title to all their property (as was done in this case) to some trustee or assignee and vesting it in them, thus opposing an obstruction to the efforts of creditors-at-law to collect the amounts which may be due to them. In this manner they frequently take the law into their own hands and attempt to secure that delay which can only be obtained by the consent of the creditors or by such a conveyance as leaves the creditors in no worse condition than they were before.

It has always been held that whatever transfer of this character—that is, of the title to property—by a failing or insolvent debtor may be valid, any instrument which secures to the assignor an interest in or an unlimited control over the property conveyed and which has the effect of hindering or delaying creditors is void, as being a fraud upon those creditors. In this instrument the grantor, Dun-

cum, reserves the surplus to himself, and the court instructs the jury that the reservation of the surplus by a failing or insolvent grantor stamps the deed as constructively fraudulent; that such a reservation is —, as settled by the highest judicial authorities, the grantor preferring himself to dissenting creditors.

A failing or insolvent debtor can reserve no use or benefit to himself out of the property assigned or conveyed. He may stipulate for a release, but he must dedicate the whole of his property not exempt by law to the payment of all his creditors; not necessarily to the payment of all in equal proportions, for he may prefer such as will execute releases, but the deed must provide for the distribution of any surplus that may remain in the hands of the trustee or assignee among his creditors. In this case there is an express reservation in favor of the grantor. It is in these words, to wit, "holding the remainder subject to the order of the said W. H. Duncum."

80 Therefore the court instructs the jury that the deed under which the interpleaders claim the property in controversy is fraudulent on its face and the same was sufficient ground for the plaintiff's attachment, and the jury should render their verdict in favor of the plaintiff.

[Endorsed:] Charge to the jury in the case of Kingman & Co. *vs.* W. H. Duncum. First division of United States court for the Indian Territory.

81 Be it also remembered that upon said trial and said date the following facts were proved, which are material, to accompany the charge of the court for its interpretation:

First. Interpleaders introduced in evidence the deed of trust under which they claimed as follows:

82 EXHIBIT.

STATE OF TEXAS, }
County of Cooke, }

Know all men by these presents that I, W. H. Duncum, a resident of the Indian Territory, for and in consideration of the sum of ten dollars paid by J. J. Salters, the receipt of which is hereby acknowledged, have sold, and by these presents do sell, transfer, convey, and confirm, unto the said J. J. Salters and to his successors in this trust the following-described property, to wit:

The storehouse now owned and occupied by the said W. H. Duncum at Beef Creek, in the Indian Territory, the fixtures therein and all goods, wares, and merchandise contained in said house, and the books, notes, and accounts of said W. H. Duncum in said business, it being intended hereby to include all stock owned by said W. H. Duncum in his business as a general merchant at Beef Creek; also all cattle and horses now owned by him at said Beef Creek, together with all and singular the rights and appurtenances to the same in any manner belonging or appertaining; to have and to hold all

and singular the property above described unto the said J. J. Salters or substitute forever.

This conveyance, however, is intended as a trust for the better securing of S. M. Huntley, Samuel Paul, S. M. White, and James Rennie against the payment of three promissory notes on which I am principal and which, as hereinafter shown, they signed as sureties; which said notes are as follows;

First.

GAINESVILLE, TEXAS, *April* 22, 1889.

On August 1st, 1889, after date, we promise to pay to the order of Stevens & Hemming fifteen hundred and fifty dollars,
83 for value received, payable at the Gainesville National bank, Gainesville, Texas, with interest from maturity until paid at the rate of 12 % per annum, with ten per cent. attorney's fees additional if collected by law.

$1,550.00. (Signed) W. H. DUNCAN.
S. M. WHITE.
JAMES RENNIE.

Second.

GAINESVILLE, TEXAS, *May* 31*st*, 1889.

On August 1st, 1889, after date, we or either of us promise to pay to the order of Stevens and Hemming twenty-five hundred dollars at the Gainesville National bank, Gainesville, Texas, for value received, with interest at the rate of 12 % per annum after maturity until paid, with ten per cent. attorney's fees additional if collected by law.

$2,500.00. (Signed) W. H. DUNCAN.
SAMUEL PAUL.
JAMES RENNIE.

Third.

GAINESVILLE, TEXAS, *July* 18, 1889.

On June 1st, 1889, after date, we or either of us promise to pay to the order of J. R. Stevens five thousand one hundred and sixty-five dollars at the Gainesville National bank, Gainesville, Texas, for value received, with interest at the rate of 10 % per annum after date until paid, with ten per cent. attorney's fees additional if collected by law.

$5,165.00. (Signed) W. H. DUNCAN.
S. M. HUNTLEY.

Upon payment of which said promissory notes according
84 to their face and tenor being well and truly made, then in such case this conveyance is to become null and void and shall be released at cost of said W. H. Duncan; but in case of failure or default of payment of said notes when they shall respectively become due or either of them, then the other of said notes shall be deemed due and payable, and in such event the said J. J. Salter is by these

presents fully authorized and empowered and it — made his special duty, upon request of either or all the aforesaid beneficiaries herein at any time made after default as aforesaid, to sell the above-described property to the bidder for cash in hand, selling at public or private sale, in bulk or retail, with or without advertisement, as may seem to said trustee or his substitute best, and after said sale shall make necessary conveyance of the property so sold and the proceeds of said sale shall pay to the above, said beneficiaries herein, in proportion to the respective amounts for which each may be surety at the time of said sale, as evidenced by the above notes and the payments that may be made thereon, in which notes all signing are sureties except W. H. Duncan, and shall pay the expenses of this trust, including a commission of five per cent. to the trustee acting hereunder, holding the remainder subject to the order of said W. H. Duncan. It is hereby specially provided that should the trustee named herein, from any cause whatever, fail or refuse to act or become disqualified from acting as such trustee, then the beneficiaries aforesaid, S. M. Huntley, S. M. White, Samuel Paul, and James Rennie, shall have full power to appoint a substitute, in writing, who shall have the same power as the trustee here-
85 inbefore named, and I by these presents ratify and confirm any and all acts which said trustee or substitute may do hereunder.

Witness my hand this 27th day of July, 1889.

W. H. DUNCAN.

Properly acknowledged before notary public.

Exhibit.

86 (Copy of which is hereto attached and made a part of this bill.)

Second. Interpleaders introduced the three notes mentioned and described in said deed of trust as therein copied, as follows:

First note dated Gainesville, Texas, April 22, 1889, due August 1st, 1889, payable to Stevens & Henning, for fifteen hundred dollars, with interest at 12% per annum, and providing for attorneys' fees, as shown in a copy in deed of trust.

Second note dated same place as first note, March 31, 1889, due same time as above note, payable to same parties, for twenty-five hundred dollars ($2,500), at Gainesville National bank, with 12% and attorneys' fees, as shown by a copy of note in deed of trust.

Third note dated July 18th, 1889, at Gainesville, Texas, due June 1st, 1890, payable to J. R. Stevens, for fifty-one hundred and sixty-five dollars ($5,165), payable at Gainesville National bank, with interest and attorneys' fees, as provided in copy of notes in deed of trust.

The first of said notes signed W. H. Duncan, S. M. White, James Rennie; second one signed W. H. Duncan, Samuel Paul, and James Rennie, and the last note by Duncan and Huntley, and

87 on the back of the last note was evidenced a transfer by J. R. Stevens to C. C. Henning, *by J. R. Stevens to C. C. Henning, to* a one-half interest in said note.

Third. J. R. Stevens, who proves that C. C. Henning and himself, J. R. Stevens, constitutes the Stevens and Henning mentioned in said notes; that each and all of said notes was given for borrowed money that Stevens & Henning had loaned to W. H. Duncan and he had executed his notes with the parties named thereon. No part or portion of said notes had ever been paid.

Fourth. J. J. Salter, who proved that on the 29th day of July, 1889, two days after the deed of trust had been made, Duncan came to where Salters was stopping and told him that he had made a deed of trust to the interpleaders, and that he, Salters, had been made trustee and wanted him to accept. Salters did so and went down to the store, where he got the keys of the store from a Mr. Mays, who gave him the keys to the store. Salters took charge and possession, and Duncan never had anything more to do with the same; never had any possession or control of it nor anything to do with it, and it was the same as to all the property, except the two cows and calves, being the cattle conveyed in the deed, remained about the place, and Mrs. Duncan milked them a short time; also the two horses, being the horses conveyed under said deed, remained in Duncan's lots and Duncan fed them. Duncan lived about three or four hundred yards from the store.

88 S. M. Huntley, one of the beneficiaries in the deed, came to the store a day or so after Salters took charge of the store and directed him to proceed to sell the property as provided by the deed of trust, but Huntley and Rennie directed that an invoice of the goods be taken, which was done by Salters and Mr. Mays. The same was finished in about ten days after the deed of trust was made; then Huntley, White, and Rennie *et al.* directed to sell goods for cash and hold the money until sale of goods in bulk could be made. In accordance with directions and some circulars sent me, I advertised the property conveyed to me by the deed to be sold at public outcry for cash, and the sale day was to be about three days after the time goods were levied upon by the marshal, with attachment in this case.

They further proved that Duncan claimed to be an Indian and had a farm near Beef Creek, I. T., where the store was situated, but the proof was not clear as to amount of farm or its value; also that the entire property conveyed by the deed, except notes and accounts, were invoiced at about $4,200, the goods being invoiced at costs and freight. It was an old stock and said goods of but little value. The property was sold by the marshal at $2,000, under order of the court. Salters sold the notes and accounts, together with $200 that he had taken in at the store, for $750; thought they were worth $1,000, but could not get that for them.

Interpleaders except to the verdict and judgment herein because the same is not sustained by the law nor evidence in the case for all

the reasons herein shown, and they pray that this bill of exceptions be signed and filed as part of the record.

JAMES M. SHACKELFORD,
Judge U. S. Court for the Indian Territory.

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KINGMAN & COMPANY
vs.
DUNCAN, Defendant, and J. J. SALTERS, *et al.*, Interpleaders. } No. 531.

In the United States Court for Indian Territory, Holding Session at Muscogee, I. T.

Now comes the interpleaders and moves the court for a new trial herein for the following reasons:

First. Because plaintiff did not introduce any notes or other evidence of indebtedness to them by Duncan at the time he made the deed of trust to these interpleaders, and it is only a creditor at the time of a conveyance by a debtor that can question the same.

Second. Because the court erred in his charge to the jury, 1st, in holding that the deed of trust was not a deed of trust; 2nd, in holding that it was fraudulent and void; 3rd, that it reserved any rights or interest to the grantor, and in telling the jury to find for the plaintiff, regardless of the facts.

S. S. FEARS & POTTER, POTTER & E.,
Attys for Interpleaders.

[Endorsed:] No. 531. Kingman & Co. *vs.* W. H. Duncan and Huntley, White, Rennie, Paul, and Salters, interpleaders. Motion for new trial. Filed May 20, 1890. Wm. Nelson, clerk.

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KINGMAN & COMPANY
vs.
W. H. DUNCAN; S. M. HUNTLEY, SAMUEL PAUL, JAMES RENNIE, S. M. WHITE, & J. J. SALTERS, Interpleaders. } No. 531.

Suit pending in U. S. court for Indian Territory, at Muscogee, Ind. Ter.

Now comes the interpleaders in the above cause and moves the court to make an order fixing the amount of the supersedeas bond to be given in this cause on writ of error to Supreme Court of the United States, and to stay the issuance of execution until the expiration of sixty days, as provided by the rules of the said Supreme Court, so as to give time for the presentation and filing of the petition for writ of error and the issuance and service of the same.

And they also move the court to grant an order for appeal or writ of error in this cause.

FEARS, POTTER, POTTER & E.,
Attys for Interpleaders.

[Endorsed:] No. 531. Kingman & Co. *vs.* W. H. Duncum, Huntley, White, Paul, Rennie, and Salters, interpleaders. Motion to fix amount of supersedeas bond and for stay of execution 60 days. Filed May 20th, 1890. Wm. Nelson, clerk.

91 In the United States Court for the Indian Territory.

S. M. HUNTLEY *et al.*, Plaintiffs in Error,
vs.
KINGMAN & COMPANY, Defendant in Error.

The above-named plaintiffs, S. M. Huntley, S. M. White, James Rennie, Samuel Paul, and J. J. Salters, conceiving themselves aggrieved by the order entered on the 20th day of May, 1890, in the above-entitled proceeding, doth hereby appeal from said order to the Supreme Court of the United States, and they pray that this their appeal may be allowed, and that a transcript of the record and proceedings and papers upon which said order was made, duly authenticated, may be sent to the Supreme Court of the United States.

POTTER, POTTER & EDDLEMAN,
Att'ys for Plaintiffs and Appellants, S. M. Huntley et al.

And now, to wit, on the 20th day of May, 1890, it is ordered that the appeal be allowed as prayed for.

JAMES M. SHACKELFORD,
Judge U. S. Court for the Indian Terr.

[Endorsed:] No. 531. S. M. Huntley *et al.*, pl'fs in error, *vs.* Kingman & Co., def'ts in error. Petition for writ of error. Filed June 5th, 1890. Wm. Nelson, clerk.

92 S. M. HUNTLEY *et al.*, Pl'fs in Error,
vs.
KINGMAN & CO., Def't in Error.

Writ of Error to the United States Court for the Indian Territory.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judge of the United States court for the Indian Territory, at Muscogee, Indian Territory, Greeting:

Because in the records and proceedings, and also in the rendition of the judgment on a plea which is in the said United States court for the Indian Territory, before you, between Kingman & Co. and S. M. Huntley, S. M. White, James Rennie, Samuel Paul, and J. J. Salter, a manifest error has happened, to the great damage of the said Huntley, White, Rennie, Paul, and Salter, as by complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the said parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the

records and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington, D. C., on the second Monday in October, 1890, next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 5th day of June, in the year of our Lord one thousand eight hundred and ninety.

W. NELSON,
Clerk of the United States Court for the Indian Territory, at Muscogee, Indian Territory.

[Endorsed:] S. M. Huntley *et al.*, plaintiffs in error, *vs.* Kingman & Co., defts in error. 531. Writ of error from U. S. Supreme Court to U. S. court at Muscogee, I. T. Filed in open court June 5th, 1890. W. Nelson, clerk.

We, the attorneys for Kingman & Co., defendants in error in the above writ of error from the Supreme Court of the United States, waive notice and service of said writ of error and waive further notice of the issuance & filing of this writ of error and agree to answer to the October term, 1890, of the Supreme Court of the United States.

KINGMAN & CO.,
By HINDS & JACKSON,
Att'ys for Kingman & Co.

93 UNITED STATES OF AMERICA, *ss:*

To Kingman & Co. or Hinds & Jackson, their attorneys of record, Greeting:

You are hereby cited and admonished to be and appear at a session of the Supreme Court of the United States, to be holden at Washington, D. C., on the second Monday in October, 1890, pursuant to a writ of error filed in the clerk's office of the United States court for the Indian Territory, at Muscogee, Ind. Ty., wherein S. M. Huntley, S. M. White, James Rennie, Samuel Paul, and J. J. Salter are plaintiffs in error, and Kingman & Co. are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, on this 5th day of June, 1890.

JAMES M. SHACKELFORD,
Judge of the U. S. Court for the Indian Terr., Muscogee, I. T.

We, the attorneys for Kingman & Co., defendants in error in the above-mentioned writ of error from the Supreme Court of the United

States, waive copy of this notice and service of the same and waive further notice of the issuance and filing of said writ of error and agree to answer to the October term, 1890, of the Supreme Court of the U. S.

KINGMAN & CO.,
By HINDS & JACKSON,
Att'ys of Record.

[Endorsed:] S. M. Huntley *et al.*, pl'ff's in error, *vs.* Kingman & Co., def'ts in error. Citation in error. Filed in open court June 5th, 1890. Wm. Nelson, clerk.

94 KINGMAN & COMPANY
vs.
W. H. DUNCAM, Def't, and S. M. HUNTLEY, SAMUEL PAUL, S. M. White, James Rennie, and J. J. Salter, Interpleaders. } No. 531.

Oath as to Amount in Controversy.

In the United States Court at Muscogee, Ind. Ter.

Now comes James Rennie, one of the interpleaders, who on oath says that the matters and things in controversy in the above cause are of value more than two thousand dollars, and that the subject-matter in dispute between plaintiff and interpleaders is of value largely more than said sum.

JAMES RENNIE.

Sworn and subscribed before me this the twenty-fourth day of May, 1890.

[SEAL.] ALBERT RENNIE,
Commissioner of the U. S. Circuit Court for the District of Kansas.

[Endorsed:] No. 531. Kingman & Co. *vs.* W. H. Duncum, Huntley *et al.*, interpleaders. Affidavit of amount in controversy. Filed May 29, 1890. Wm. Nelson, clerk.

95 In the Supreme Court of the United States.

KINGMAN & COMPANY
vs.
W. H. DUNCUM, Defendant, and S. M. HUNTLEY, SAMUEL Paul, S. M. White, James Rennie, and J. J. Salter, Interpleaders. } No. 531.

In the United States court for the Indian Territory, holding sessions at Muscogee, in the Indian Territory.

Supersedeas bond of the interpleaders, Huntley, Paul, White, Rennie, and Salter, on writ of error from the Supreme Court of the United States of America to the United States court for the Indian Territory, at Muscogee, Ind. Ty.

Know all men by these presents that we, S. M. Huntley, Samuel Paul, S. M. White, James Rennie, and J. J. Salter, interpleaders, as

principals and as sureties, acknowledge ourselves to owe and be indebted and bound to pay unto Kingman & Co., plaintiffs in the above cause, the sum of five thousand dollars, the same being more than double the plaintiffs' judgment herein and more than the amount of the supersedeas fixed by the court, conditioned that the said Huntley, Paul, White, Rennie, and Salter, plaintiffs in error in the Supreme Court of the United States, shall prosecute their writ of error to effect, and if they fail to make their plea good shall answer all damages, judgments, and costs that may be rendered or assessed by the said Supreme Court of the United States against them in the above cause.

96 Witness our hands on this the 21st day of May, A. D. 1890.

S. M. HUNTLEY.
S. M. WHITE.
SAML PAUL.
JAMES RENNIE.
J. J. SALTER.
C. C. HEMMING.
J. R. STEVENS.
L. O. ROBERTSON.
J. B. SPRAGINS.

97 INDIAN TERRITORY, }
Chickasaw Nation. }

I, L. O. Robertson, a resident of the Chickasaw nation, Indian Territory, solemnly swear that I am worth the sum of five thousand dollars.

L. O. ROBERTSON.

INDIAN TERRITORY, }
Chickasaw Nation. }

I, J. B. Spragins, a resident of the Chickasaw nation, Indian Territory, hereby solemnly swear that I am worth the sum of five thousand dollars.

J. B. SPRAGINS.

INDIAN TERRITORY, }
Chickasaw Nation. }

I, W. B. Johnson, United States commissioner for the eastern district of Texas, residing at Ardmore, I. T., hereby certify that I am well acquainted with the sureties, L. O. Robertson and J. B. Spragins, on the annexed bond; that they are, in my judgment, well worth the sum of $5,000.00 each and are amply sufficient to make said bond good.

Witness my affixed seal — signature this 22nd day af May, A. D. 1890.

W. B. JOHNSON, [SEAL.]
U. S. Com. E. D. T.

I, D. E. Barrett, judge 16th judicial — of Texas, certify that I am acquainted with the sureties on the above bond and regard them as

worth many times the amount of said bond, and that said sureties are ample good for said sum.

D. E. BARRETT,
Judge 16th Judicial District of Texas.

Attest: J. F. LILLY,
Clerk District Court, Cooke County, Texas.

Approved in open court Aug. 11th, 1890.
JAMES M. SHACKELFORD,
Judge, U. S. Court for the Indian Territory.

[Endorsed:] No. 531. Kingman & Co. *vs.* W. H. Duncan, def't, S. M. Huntley, Sam'l Paul, S. M. White, James Rennie, and J. J. Salter, interpleaders. Supepersedeas bond. S. M. Huntley *et al.*, pl'ffs in error, *vs.* Kingman & Co., def'ts in error. Supreme Court U. S. Filed in open court June 5th, 1890. Wm. Nelson, clerk.

98 Supreme Court of the United States, October Term, 1890, of said Court.

S. M. HUNTLEY, S. M. WHITE, SAMUEL PAUL, JAMES RENNIE, J. J. SALTER, Plaintiffs in Error,
vs.
KINGMAN & Co. (a Corporation), Def't in Error. } No. 531.

Now comes the said Huntley, White, Paul, Rennie, and Salter, plaintiffs in error, by their attorneys, and say that in the record and proceedings in the above cause there is manifest error in this, to wit:

First. Kingman & Co., defendants in error, were not shown to be creditors of W. H. Duncum at the time Duncum made the deed of trust to plaintiffs in error, viz., on the 27th day of July, 1889, and could not be heard to question that instrument.

Second. It was error to hold and instruct the jury that the deed of trust under which the plaintiffs in error held the property levied upon was void.

Third. It was error to hold and instruct the jury that the reservation to the grantor of the residuary interest in the property after payment of the debts secured by the deed of trust made that instrument fraudulent and void upon its face.

Fourth. It was error to hold the deed of trust an unknown and unusual instrument and void by reason of that fact.

99 And the said plaintiffs in error pray that the judgment aforesaid rendered by the United States court for the Indian Territory may be reversed, annulled, and held for nought and plaintiffs in error restored to all their rights.

POTTER, POTTER & EDDLEMAN,
Att'ys for Plaintiffs in Error.

[Endorsed:] No. 531. S. M. Huntley *et al.*, pl'ffs in error, *vs.* Kingman & Co., def'ts in error. Assignment of error. Filed June 5th in open court. Wm. Nelson, clerk.

100 In the United States Court for the Indian Territory.

KINGMAN & COMPANY, Plaintiff.
vs.
W. H. DUNCAN *et al.*, Defendants. } No. 531.

And now, on this 6th day of June, 1890, comes the plaintiff herein and moves the court for an order on T. B. Needles, U. S. marshal/ for the Ind. Territory, to pay to the plaintiff in this action all money now in his hands arising from the sale of the property attached in this action, upon the plaintiff executing to said marshal/ a good and sufficient bond to be approved by said marshal/ in double the amount of all money so paid, conditioned that said money shall be returned to said marshal/, if a return thereof be allowed by this court or the Supreme Court of the United States on an appeal from this court.

HINDS & JACKSON,
Att'ys for Plaintiff.

[Endorsed:] No. 531. Kingman & Co., plaintiff, *vs.* W. H. Duncan *et al.* Motion for marshal/ to pay out money. Filed June 5, 1890. Wm. Nelson, clerk. Hinds & Jackson, att'ys for pl'tff.

101 In the United States Court for the Indian Territory, Holding Session at Muskogee, Indian Territory.

KINGMAN & COMPANY, Plaintiffs,
vs.
W. H. DUNCAN, Defendant, and S. M. HUNTLEY, SAM PAUL, S. M. WHITE, JAMES RENNIE, and J. J. SALTERS, Interpleaders. } No. 531.

Be it remembered that upon trial of the above cause in the above court on May 20th, 1890, and during April term, 1890, on the matters and issues made between said plaintiffs, Kingman & Co., and the said interpleaders, viz., Huntley, Paul, White, Rennie, and Salters, interpleaders, introduced in evidence on their behalf to sustain the issues tendered in their interplea the following testimony—three notes—in words and figures as foll-ws:

GAINESVILLE, TEXAS, *April* 22, 1889.

On August first, 1889, after date, we promise to pay to the order of Stevens & Hemming fifteen hundred and fifty dollars for value received, payable at the Gainesville National bank, Gainesville, Texas, with interest from maturity until paid at the rate of 12 per cent. per annum, with ten per cent. attorneys' fees additional if collected by law.

$1,550.00. (Signed) W. H. DUNCAN.
S. M. WHITE.
JAMES RENNIE.

102 2nd.

GAINESVILLE, TEXAS, *May* 31*st*, 1889.

On August 1st, 1889, after date, we or either of us promise to pay to the order of Stevens & Hemming twenty-five hundred dollars, at the Gainesville National bank, Gainesville, Texas, for value received, with interest at the rate of 12 per cent. per annum after maturity until paid, with 10 per cent. attorneys' fees additional if collected by law.

$2,500.00. (Signed) W. H. DUNCAN.
SAMUEL PAUL.
JAMES RENNIE.

3rd.

GAINESVILLE, TEXAS, *July* 18*th*, 1889.

On June 1st, 1890, after date, we or either of us promise to pay to the order of J. R. Stevens five thousand one hundred and sixty-five dollars, at the Gainesville National bank, Gainesville, Texas, for value received, with interest at the rate of 10 per cent. per annum after date until paid, with 10 per cent. attorneys' fees additional if collected by law.

$5,165.00. (Signed) W. H. DUNCAN.
S. M. HUNTLEY.

Interpleaders also introduced as witnesses on their behalf J. J. Salter and J. R. Stevens, who testified as follows:

J. J. SALTERS stated:

My name is J. J. Salters. I live at Beef Creek. I know W. H. Duncan, J. R. Stevens, C. C. Henning, Sam. Paul, Mr. Huntley, Mr. White, and Mr. Rennie. I know of the store and stock of goods owned by W. H. Duncan in July, 1889, situated at Beef
103 Creek, in the Chickasaw nation. I had worked for Mr. Duncan before that time, but was not working for him at the time of the deed of trust was given. I left the store on the eighth of June, and I did not come back to it until, I think, the 29th of July. I have heard the date of this instrument named since I have been here in this trial. At the date of its execution I was two or three miles from the store, boarding with a friend. Mr. Duncan came after me to take charge of the stock. After I was notified that the deed of trust had been made and I was named as trustee I went down and took charge of the stock of goods and the store, &c. After that time Mr. Duncan had nothing to do with the goods or store. I staid in the store from that time on. I had the goods. The stock of goods was sold finally to Garvin.

I retailed some of the goods before they were attached. I joined the marshal in making the sale. I think that about $200 worth of goods had been sold before the goods were attached. I knew something of the value of this stock of goods. We got the best that was offered at the sale—not the invoice price. The marshal made efforts to get good bidders; I did not, because I understood I was

simply to help the marshal. We did not get the invoice price. The stock of goods was old, and a good deal of it was remnants. By the invoice price I mean the cost and carriage as marked on the goods. We took no notice of the fact that they were old and remnant goods. I do not remember what they invoiced. I do not remember the exact value of the property sold; it was something over $4,000 in the original invoice. This included all the property, not including books
104 and accounts which I suppose were of some value. The books and accounts were subsequently sold by myself for $700, that was the best I could get, though at the time I did not think it was enough. I could not tell just how much they were worth; some were good, most of them I did not consider good. I knew most of the people in the accounts. In my best judgment I think that one thousand dollars would be enough. I could not get that. I tried, but could not get but seven hundred dollars, that was the best I could get. I advertised the stock of goods for sale under this deed of trust by posting bills and sending them out through the country. I think there was an advertisement placed in the paper. I gave bills to the neighbors and people who came to the store asking them to post them in public places. At the time of the levy of the writ of attachment the stock was advertised for sale, and was to be sold a few days after the attachment, but a sale had not been made. I do not remember the date, but it was only a few days after the attachment that the stock was to have been sold. I do not know whether any of those old advertisements are in existence or not. Some were left in the store after the attachment. I did not take care of them, I have none of them. Some may be in the store yet. I know nothing as to why these notes were given beyond what is given in the deed of trust, know nothing of the transaction.

Mr. Duncan lives at his residence near Beef Creek store, a couple hundred yards from there, in the little town of Beef Creek. There is a farm two or three miles from there, I do not know just
105 how far. Of my own knowledge I cannot tell the size of the farm. From reputation I know something of the size of the farm from the men living on it.

I think there are about four families, four men cultivating and living on the place. I cannot tell the size of the farm except from the number of men cultivating it. I have been on the farm, but not enough to tell the number of acres in it. From what I could see I suppose there are two or three hundred acres in it. I do not think I saw but two small houses, such as were built for renters. The farm is fenced, I saw a portion of the fence. I have not been out to the farm this year, have not seen it, of my own knowledge do not know that there are renters on it this year.

Cross-examination:

I have been acquainted with Mr. Duncan about three years. I worked for him about two years; not quite that long. I was clerk for him in the store at Beef Creek. I left the store on the 8th of June, 1889. From there I went to various places, was in Texas

most of the time. I had quit the store. I was on friendly terms with him.

I know Huntly, Paul, and Rennie, first got acquainted with them I could not tell exactly when, saw them frequently at the store. I knew them by sight during the time I was in the store, but was not intimately acquainted with them.

Mr. Duncan came and informed me that a deed of trust had been executed about the 29th. My recollection is that I took charge about the 29th. He came on Sunday to where I was boarding and told me he had a deed of trust, and I was appointed trustee.
106 I do not know that I could tell everything he told me. He told me the beneficiaries had appointed me in charge of the stock. I could not tell positively whether he said he or the beneficiaries had appointed me. My understanding is that I was appointed at his request. He did not have the deed of trust along with him. I was to take charge of the goods as trustee and sell them out. I first received a copy of the instrument through the mail a few days after I took charge. I cannot tell who sent it to me in the mail from Gainesville, but think that Mr. Henning did. I do not remember Mr. Duncan having anything to do with the store after I went in there and took charge of it. He was there once in awhile, but did not assist me in selling goods. Did nothing about keeping up the store. I took charge of the stock of goods. That was all I took charge of. I was in the store all the time. I saw from the deed of trust what I was to do. On Monday morning I went there. I took charge of the books, accounts, notes, &c. The wagon scales were where they had been used. I had control of them but did not use them. I found no cash in the store when I went there. I made an invoice a day or two afterwards. There was $27.37 which I had sold after taking charge. When I first went in there was no cash at all.

There were two corn-crushers there in the back end of the store. I took charge of them. There were hogs there and I took possession of them when I took the invoice. I think we got the instrument before taking the invoice.

There were two cows and calves there about the place. They just remained on the place. Mrs. Duncan milked them while she was there. She was only there a few days, and after she
107 left a lady who lived with Mrs. Duncan milked them, as I supposed at her request. There were two horses there. They were not under my charge. They remained there and Mr. Duncan took charge of them.

There was no change made as to things until after I made the invoice. I took a little cash or book account and kept it there in the business.

Mr. Mayes helped make the invoice. He was a man who helped Duncan in the store. He had worked for Duncan, but commenced working for me on the day I commenced making the invoice. Mr. Duncan handed me the keys Sunday. When I went down there I got the keys from him. He, I think, went down to his brother's that evening and came back when I went to take the invoice. He

did not go to work there until that time. No one but myself was in the store until I commenced taking the invoice. I have a copy of that invoice. The original invoice I think I gave to Mr. Rennie or some one of the beneficiaries. I could not tell just when. Mr. Huntley was the first one of the beneficiaries I saw after taking charge of the store. I do not remember just the date. I wrote to him and he came down. I could not tell how long after taking the invoice. I do not think it was over eight or ten days after taking the invoice.

Mr. Huntley, I think, came down before I took the invoice. When he came down he told me to take the invoice. He told me also to sell goods for cash, and to make arrangements to pay for my board out of the business. He did not tell me what price to sell them for—did not tell me to mark them down.

There was no arrangement made to supply any staples we
108 might get out of. I do not remember when I next saw him. I do not know what he said. Mr. Duncan was there the first time Mr. Huntley came. He did not advise with me as to how the goods were to be sold out, nor from my recollection do I think he made any suggestions. I think he came back in a day or two. Do not remember what arrangements were made. Do not remember seeing him again. Afterwards I saw Rennie and White. Do not remember which I saw first. They did not come there together. Mr. White lived near. Mr. Rennie did not come with him. They made no arrangement. Mr. Rennie came up and told me to proceed with the invoice. I began, I think, to take the invoice while Mr. Rennie was there.

I saw all the beneficiaries occasionally except Mr. Paul. I do not think I saw him.

I was simply directed to sell goods for cash at retail.

I had one clerk for two or three weeks—Mr. Mayes—after that I had none.

I did not say I issued a circular. I put out some circulars. My name was put to them as trustee. I distributed them. I think the first circulars were struck for the property to be sold the 10th of September; am not positive as to date. I sold those accounts in Jan. My recollection is that the judgment was the 28th of October. $200 was all I sold except some money I took for expenses besides that. According to instructions from Henning, I sold goods to Duncan and charged to him. He was the only man except myself to whom I sold goods and whose name was on the books. I
109 meant to sell him goods enough to pay my board. I was paying $10 a month for board and meant to sell that much to him. I turned over this $200 to Sam. Garvin the morning the stock was sold—sold him what money I had on hand—about $200.

I joined the marshal in the sale of all the property attached and sold the books and accounts and turned the money over to him in this way. Mr. Garvin employed me to run the stock. Mr. Garvin lives at White Bead hill; is not related to any of these parties. He is merchandizing; has stock and a farm.

I sold the whole business for $750. I had an idea the books were worth $1,000, but that was the best offer I had. I sold the books at Gainesville to Mr. Huntley and Garvin bought them of him. I think that Garvin paid the same that Huntley paid for them.

Of my own knowledge, I do not know what these notes were given for. I do not think Duncan was in there every day. He was gone part of the time. He went, I suppose, to Tishomingo.

Duncan is an Indian. I do not know that he is an Indian, only what he says, but he holds a farm as an Indian. I do not know how many acres his farm covers.

At the time of the attachment, I was contemplating a sale to the highest bidder, but I do not remember having heard any one say that they would give anything. I got instructions from Mr. Huntley about the time I received this notice. I sent it a few days, some eight or ten days perhaps, before the time of the sale to sell to the highest bidder; did not know beforehand that the goods were to be attached.

110 Redirect:

I was there the day of the attachment. J. M. Wright ran it. I told him at the time he served the papers, "I suppose you are aware that there is a deed of trust." I think the conversation between him and me was about to that effect. He said, "I have heard there was a deed of trust or assignment or something of that kind." I told him that I was the trustee.

Cross-examination:

I do not know of any note, but I do know of an account of S. M. White for $316.56.

J. R. Stevens stated: I know C. C. Henning. I am the Stevens in the notes named. I do not know that I ever saw these notes before myself. Mr. Henning transacted this business. I know something of the indebtedness. These notes were given for money. These notes came to be dated at different times because we did not have money during the winter. I think we let him have $5,000; some time in December the thing matured and was renewed—the other notes were — we let him have perhaps in April or May. Any how, after he delivered his cattle on the strip let him have some money. He borrowed the money all winter along at different times. These notes were given to secure the amount.

I live at Gainesville. Mr. Henning lives at Gainesville.

I know White, Huntley, Paul, and Rennie.

Cross-examination:

I am vice-president of the bank, but am not employed in the bank. I spend most of my time fishing and hunting. I know the money was furnished because the money was charged to my account. My first knowledge of it was because I was the first
111 man who agreed to let Duncan have the money. I suppose Mr. Duncan bought corn with the money. He delivered the

cattle on the strip to me; he delivered 2,009 head of cattle to us on the strip. I had possession of the cattle in fact all the time. These were the cattle Duncan was buying corn for. They were Stevens and Henning's cattle. He borrowed this money of us to feed our cattle. We sold the cattle, shipped them, and gave him credit for all the cattle brought. He bought the cattle from us at a certain price. He was to pay us so much for the cattle. He had the cattle to feed in the fall. After he had fed the cattle through the winter he was to get credit for all they brought. He was indebted to us, and the cattle reduced his indebtedness to us. We had let him have some eleven thousand, close on to twelve thousand dollars.

I was on the ground and made all the dealings with him upon Beef Creek, in the Indian Territory. The note specified the rate of interest to be paid for the money as twelve per cent. The rate agreed upon for attorney's fees was ten per cent. I think we let him have over ten thousand dollars.

Redirect:

The cattle amounted to $56,000. Duncan's whole indebtedness at one time was $62,500. The cattle brought fifty-three or fifty-four thousand dollars. He had sixty-two thousand and maybe five hundred. We held the cattle still in our name to secure this. The cattle when shipped out brought fifty-two or fifty-three thousand. He was credited with the entire amount. These notes were the balance. The first shipment was about the 20th of last
112 June. We shipped all through the summer. The market was the cause of the loss.

This transaction was made with me before the notes were made in Gainesville and the money charged to my bank account. I do not know that I ever saw one of the notes before.

Cross-examination:

There was quite a loss when the cattle were shipped. I did not share the loss with Duncan. It was not our business to share the loss. We sold the cattle to him at a certain price.

The plaintiffs introduced on their behalf J. F. FORTUNE, who testified as follows:

J. F. FORTUNE:

At the present time I am the traveling representative of the plaintiffs in this case. I occupied this position at the time these notes were given. I visited Beef Creek; saw Mr. Duncan. I have been there several times. I sold him the goods. I took the notes. I was there shortly before and shortly after the deed of trust was executed. At the time that I was there, in July, 1889, Mr. Duncan was running the store. The notes, according to my impression, were given in July. I was there in August after the assignment, about the 10th or 12th. I saw Mr. Duncan about the premises. Mr. Salter was in charge. Mr. Salter was managing the store.

I did not examine into the details of the business; did not examine the books. I think I saw them selling goods. Customers were in the store pricing goods.

113 I saw Mr. Rennie on my way before I went over there. I did not have a great deal of conversation; stopped at his store on my way to Beef Creek or on my way back. I told him I understood the store was in charge of an assignee and it seemed we were debarred from getting any money at present. He said, Yes; such was the case. Very little conversation passed between Mr. Rennie and myself. I saw Mr. Henning at Gainesville. He is not one of the beneficiaries.

I have seen several instances of Mr. Duncan's handwriting. This letter is signed W. H. Duncan and I should judge he wrote it. It resembles his signature very much.

Cross-examination:

I have seen Mr. Duncan sign his name I suppose half a dozen times.

Copy of letter.

BEEF CREEK, I. T., *Aug. 8th*, 1889.

Mess. Kingman & Co., St. Louis, Mo.

GENTLEMEN: I have lost lots of money on the 2,000 steers I fed last winter. I find out since your Mr. Fortune were here, owing to the extreme low prices of cattle in market, and I am going to be unable to pay my debts. I have made a deed of trust of everything I have to save men who helped me to borrow the money. I did not keep a dollar; turned all I had loose. Col. J. R. Stevens, of Gainesville, who let me have the cattle, will let me have cattle again to full feed, to be shipped March and April next, and my sureties will handle the cattle, at which time I can get them to make a just and equitable settlement with all my creditors.

The trustee is J. J. Salters; beneficiaries are S. M. Huntley, James Rennie, S. M. White, Sam. Paul, Mr. J. J. Fisher, of St. Louis; know S. M. Huntly. I thought this best for all concerned.

Yours, respectfully,

W. H. DUNCAN.

114 The above and foregoing was all the evidence introduced on the trial of this cause.

HINDS & JACKSON, *Att'ys for Plaintiff.*
POTTER, POTTER & EDDELMAN AND
S. S. FEARS, *Att'ys for Interpleaders.*

Approved.

JAMES M. SHACKELFORD,
Judge U. S. Court for the Indian Territory.

115 UNITED STATES OF AMERICA, }
Indian Territory. }

In the United States Court in the Indian Territory.

I, William Nelson, clerk of the United States court in the Indian Territory, do hereby certify that the above and foregoing is a full, true, and correct transcript of case No. 531, wherein Kingman and Company, a corporation, is plaintiff and W. H. Duncum is defendant and S. M. Huntley, Samuel Paul, S. M. White, James Rennie, and J. J. Salters are interpleaders, as appears of record in my office.

Witness my hand and the seal of said court this 26th day of September, A. D. 1890.

[Seal United States Court in the Indian Territory, First Division.]

W. NELSON, *Clerk.*

[Endorsed:] No. 531. Kingman and Co. *vs.* W. H. Duncum, defendant; S. M. Huntly, Sam. Paul, S. M. White, James Rennie, and J. J. Salters, interpleaders.

Endorsed on cover: Case No. 14,275. Indian Territory U. S. court. No. 256. S. M. Huntley, S. M. White, James Rennie, Samuel Paul, and J. J. Salter, plaintiffs in error, *vs.* Kingman & Co. Filed October 14, 1890.

Office Supreme Court U. S.
FILED.
JAN 19 1894
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1893.

S. M. HUNTLEY ET ALS.
PLAINTIFFS IN ERROR,
vs.
KINGMAN AND COMPANY.

Term No. 256.

In Error to the United States Court for the Indian Territory.

BRIEF AND ARGUMENT FOR PLAINTIFFS IN ERROR

JOHN J. WEED,
Attorney for Plaintiffs in Error.

WASHINGTON, D. C.:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1893.

Supreme Court of the United States.

OCTOBER TERM, 1893.

S. M. HUNTLEY, S. M. WHITE, JAMES RENNIE, SAMUEL PAUL, AND J. J. SALTERS, *Plaintiffs in Error,* *vs.* KINGMAN AND COMPANY.	*Term No.* 256.

In Error to the United States Court for the Indian Territory.

BRIEF AND ARGUMENT FOR PLAINTIFFS IN ERROR.

I.

STATEMENT OF THE CASE.

This case results from certain judicial proceedings, commenced by attachment in the United States court for the Indian Territory, and the following facts appearing in the record are material to its proper presentation here, to wit:

First. That the plaintiffs in error, by J. J. Salters, as

trustee, were on the 12th day of October, 1889, in the actual possession of the property which is the subject of this suit, under and by virtue of the provisions of a certain deed of trust executed by W. H. Duncum to said Salters as trustee on the 27th day of July, 1889. The said deed of trust contained the following provisions, to wit:

That in consideration of the payment of the sum of ten dollars paid by J. J. Salters, the said W. H. Duncum has sold, and by these presents does sell, confirm, and convey, unto the said J. J. Salters and to his successors in this trust the following-described property, to wit:

The storehouse now owned and occupied by the said W. H. Duncum at Beef Creek, in the Indian Territory, the fixtures therein, and all goods, wares, and merchandise contained in said house, and the books, notes, and accounts of said W. H. Duncum in said business, *it being intended hereby to include all stock owned by said W. H. Duncum* in his business as a general merchant at Beef Creek, Indian Territory; also all cattle and horses owned by him at said Beef Creek, together with all and singular, the rights and appurtenances to the same in any manner belonging or appertaining; to have and hold, all and singular, the property above described unto the said J. J. Salters or substitute forever. This conveyance is, however, intended as a trust for the better securing of S. M. Huntley, Samuel Paul, S. M. White, and James Rennie against the payment of three promissory notes on which I am principal, and which, as hereafter shown, they signed as sureties.

There are then set out in full in the deed of trust promissory notes as follows:

1st. Note dated April 22, 1889, for $1,550, payable August 1, 1889, and signed by W. H. Duncum, S. M.

White, and James Rennie, and payable to Stevens & Henning.

2d. Note dated March 31, 1889, for $2,500, payable August 1, 1889, and signed by W. H. Duncum, Samuel Paul, and James Rennie, and payable to Stevens & Henning.

3d. Note dated July 18, 1889, for $5,165, payable June 1, 1890, and signed by W. H. Duncum and S. M. Huntley, and payable to J. R. Stevens.

The said deed of trust then further provided as follows:

1*st*. *That upon payment of the said promissory notes, according to their face and tenor, being well and truly made, then and in such case this conveyance is to become null and void, and shall be released at the cost of said W. H. Duncum.*

2d. That in case of failure or default of payment of said notes when they shall respectively become due or of either of them, then the other of said notes shall be deemed due and payable; and that in such event the said J. J. Salters *is by these presents fully authorized and empowered, and it is made his special duty, upon the request of either or all the aforesaid beneficiaries herein, at any time made after default as aforesaid, to sell the above-described property to the highest bidder for cash in hand, selling at public or private sale*, in bulk or in retail, with or without advertisement, as may seem to said trustee or his substitute best; and, after said sale, shall make the necessary conveyance of the property so sold, and the proceeds of the said sale shall pay to the above-described beneficiaries herein, in proportion to the respective amount for which each may be surety at the time of said sale, as evidenced by the said notes, and the payments that may be made thereon, in which notes all signing are sureties except W. H. Duncum, and shall pay the expenses of this trust, holding the remainder subject to the order of W. H. Duncum.

3d. That should the trustee named herein, from any cause whatever, fail or refuse to act or become disqualified from acting as such trustee, then the beneficiaries aforesaid, S. M. Huntley, S. M. White, Samuel Paul, and James Rennie, shall have full power to appoint a substitute in writing, who shall have the same powers as the trustee hereinbefore named.

Record, pp. 29, 30, 31, 36, 37, 38, 44, 45, 46.

Second. That the property included in and covered by said deed of trust was, when the said deed was executed, situated at Beef Creek, in the Chickasaw Nation, in the Indian Territory; and the said trustee was notified of said trust, and accepted the same by taking possession of the said property described in the said deed on the 29th day of July, 1889, and the said trustee remained in possession of the said property from said date until the 12th day of October, 1889, when so much of the said property as had not been previously sold by said trustee was levied upon and taken into the possession of the United States marshal for the Indian Territory under certain proceedings in attachment commenced in the United States court for the Indian Territory by Kingman and Company, who are the defendants in error, against the said W. H. Duncum.

Record, pp. 8, 9, 12, 55, 56, 57, 58.

Third. That the proceedings in attachment to which reference is made in the preceding paragraph were commenced by the defendants in error, who are alleged to be a corporation existing under the laws of the State of Illinois, on the 28th day of September, 1889, and the said W. H. Duncum was alleged to be a white man, a citizen of the United States, and a resident of and a person

found within the Indian Territory and within the jurisdiction of this court.

Record, pp. 8, 9, 12.

The said attachment was sued out under the provisions of chapter IX of the Statutes of the State of Arkansas, relating to attachments. That statute is adopted as a code of procedure in such cases by section 6 of an act entitled "An act to establish a United States court in the Indian Territory, and for other purposes," approved March 1, 1889.

Supplement to Revised Statutes, p. 672.

The complaint averred an indebtedness by the defendant Duncum to Kingman and Company, amounting to $1,994.42, upon two promissory notes dated July 19, 1889, as follows: one for the sum of $1,000, due October 1, 1889, and the other for the sum of $994.42, due November 1, 1889. The said Kingman and Company, by their attorney, stated in an affidavit the following grounds for the issuance of said attachment, to wit: "*That the said W. H. Duncum, the defendant, has sold, conveyed, and otherwise disposed of his property, and has suffered and permitted it to be sold, with the fraudulent intent to cheat or defraud his creditors and to hinder and delay them in the collection of their debts*, and is about to remove his property, or a material part thereof, out of the Indian Territory, with the intent or to the effect of cheating and defrauding his creditors and of hindering and delaying them in the collection of their debts."

Record, p. 9.

THE PLAINTIFFS IN ERROR INTERPLEAD AND ASSERT A LIEN UPON AND CLAIM TO THE PROPERTY ATTACHED BY THE MARSHAL.

On the 4th day of November, 1889, James Rennie, Samuel Paul, S. M. Huntley, S. M. White, and J. J. Salters, by their interplea filed in said suit, under the provisions of section 356 of the Revised Statutes of the State of Arkansas (chapter IX, p. 230, Title Attachments), claimed the property which had been levied upon by the marshal by virtue of said writ or order of attachment, and in their said interplea they stated the following facts, to wit:

1st. That the property levied upon by virtue of the order of attachment issued herein, consisting of a general stock of merchandise, some scales and other property, a description of which is contained in the marshal's return on said order of attachment, is, and was at the time of the levy, subject to a valid subsisting *lien* on the same for more than the worth of such property.

2d. That on the 27th day of July, 1889, the said Huntley, White, Paul, and Rennie were sureties for the said defendant Duncum on three promissory notes payable to Stevens and Henning; one for $1,500, dated April 22, 1889, and due August 1, 1889, signed by Duncum, White, and Rennie; one for $2,500, dated May 31, 1889, due August 1, 1889, signed by Duncum, Paul, and Rennie; one for $5,165, dated July 18, 1889, and due June 1, 1890, and signed by said Duncum and Huntley; and that each and all of said notes bear interest, and provide for the payment of attorney's fees and are fully described in a deed of trust given to secure the sureties on the same, which deed of trust is attached to and made a part of said plea; and that on the said 27th day of July, 1889,

the said Duncum recognizing that the other parties above named were his accommodation sureties on said notes, and for the purpose of securing and saving his said sureties harmless from costs, did on said date make, execute, and deliver to the said J. J. Salters, as trustee, that certain deed of trust a copy of which was attached to said plea and marked "Exhibit A."

3d. That immediately after the execution of said deed of trust and on the 29th day of July, 1889, the said Salters, at the instance of the said Duncum, took absolute and actual possession of the property mentioned in said deed, and began the discharge of his duties as such trustee, and had advertised the property for sale, and had procured a buyer for the same at its full, fair, cash value, at the time the levy was made upon the same as aforesaid; and that at the time of said levy said trustee was in the actual possession of said property under said deed, and the plaintiffs, Kingman and Company, and the officer who made the levy were notified and were well aware of that fact before the levy was made; that the said notes are still unpaid, and are valid subsisting claims against the said Duncum and his said sureties, and that said deed of trust is a valid subsisting *lien* upon said property to secure the parties aforesaid.

The said sureties and the said trustee therefore prayed the court for an order restoring the said property to the possession of said trustee; that he may execute said trust upon giving such bond as the court may require to protect any supposed rights of the plaintiffs under said levy; or that the trustee be ordered to sell the goods under the power conferred by said deed and to deposit the proceeds in court to abide the decision of the court as to the rights of the parties.

Record, pp. 28, 29.

The court thereupon and on the 17th day of December, 1889, made an order in said suit directing the marshal to sell the property attached by him under said order of attachment, and that the said trustee, J. J. Salters, join in said sale, "so as to pass the unencumbered title to said property," and that the marshal hold the proceeds subject to the order of the court; and the marshal sold the property so attached by him on the 21st day of January, 1890, for the sum of $2,010 in cash.

Record, p. 33.

DEMURRER AND ANSWER OF DEFENDANTS IN ERROR TO THE INTERPLEA OF PLAINTIFFS IN ERROR.

The said Kingman and Company, on the 17th day of May, 1890, filed a demurrer to said interplea; but it was waived by them by their filing an answer to said interplea on the 18th day of May, 1890. The answer filed to said interplea contained the following statements in denial of the facts stated in said interplea:

1st. It denies that the interpleaders have any right or interest in the personal property levied upon by the United States marshal by virtue of said attachment.

2d. It denies that the notes hereinafter described as being and purporting to be signed by the said beneficiaries were signed by them as sureties.

3d. It denies that W. H. Duncum was indebted to said beneficiaries or to Stevens and Henning in the amounts and sums mentioned in said notes.

4th. It avers that said notes are illegal and void for the reason that the whole transaction, trade, and subject of settlement of business between the bank of Gainesville and Stevens & Henning and the defendant W. H. Duncum was had in the Indian Territory, and all the property

affected and disposed of between said parties was in the Indian Territory; and that said notes contain an illegal rate of interest, to wit, 12 per cent., and attorneys' fees of 10 per cent.

5th. It denies that said Duncum received any consideration for said notes.

6th. It denies that the parties named in the interplea as beneficiaries were accommodation indorsers or sureties for said W. H. Duncum, but, if liable at all on said notes, were liable as principals and makers.

7th. It denies that the instrument termed by said interpleaders as a trust deed is valid in law or gave to said interpleaders any right, title, or interest in or to the property attached by the marshal and held in this action; but the plaintiffs allege the truth to be that said instrument was made voluntary by the said W. H. Duncum for the purpose of placing all of his property beyond the reach of his creditors, and to hinder and delay them in the collection of their debts; and that said instrument is void in law and of no effect, and gives to said interpleaders no right or interest in said goods and property.

8th. It denies that said J. J. Salters was acting for the beneficiaries named in said instrument, but avers that said Salters was a clerk of the said W. H. Duncum, and was assisting him in fraudulently disposing of his property to hinder and delay his creditors in the collection of their debts.

9th. It denies that the said Salters took absolute possession of said goods for the purpose of paying the creditors of said W. H. Duncum out of the proceeds of the sales of said goods, but for the purpose of protecting them from the creditors of said W. H. Duncum, and in the interest of the said W. H. Duncum, and that he held them at the time of the levy of the attachment by the United States marshal in this action.

And they therefore prayed that they be allowed to sell said property on their attachment, and apply the proceeds to the satisfaction of their debt.

Record, pp. 35, 36, 37, 38.

II.

Facts Proved at the Trial of the Above Issues.

1st. The execution of the above deed of trust was proved, and it was offered in evidence.

2d. The notes described in said deed of trust were proved to have been signed by the parties who are alleged to have signed them as stated in said deed of trust and in the claim made to the property by the plaintiffs in error.

3d. The said notes were given for borrowed money that Stevens and Henning had loaned to W. H. Duncum, and he had executed his notes with the parties named thereon; and that no part or portion of said notes had ever been paid.

4th. That on the 29th day of July, 1889, two days after the execution of said deed of trust, W. H. Duncum, the grantor in said deed, went to the place where Salters, the trustee, was stopping and told him he had made a deed of trust to the interpleaders and that he, Salters, had been made trustee, and wanted him to accept. Salters accepted the trust and went down to the store, where he got the keys from Mr. Mayes. The trustee took charge and possession of the store, and Duncum never had anything more to do with the store; he never had any possession or control of it nor anything to do with it after the trustee took possession.

Record, pp. 44, 45, 46, 47, 55, 56, 57.

III.

Charge of the Court and Exceptions Thereto by the Plaintiffs in Error.

The counsel for the plaintiffs in error specially and in apt time excepted to the following parts of the charge given to the jury by the court on the trial of said issues, to wit:

1st. "That the instrument—meaning the deed of trust from Duncum to Salters—is wanting in several of the essentials of a deed of trust. In some of its features it is new and without precedent in the customs of conveying.

"J. J. Salters, the so-called trustee, was not to have possession of the property nor any part thereof except upon request of the beneficiaries at any time made after default in the payment of the notes or some one of them; then, and not till then, was he to be authorized to take possession of the property, and proceed to sell it in bulk or retail, with or without advertising, as said trustee might deem best, the trustee to make the necessary conveyance of the property so sold; and the proceeds of such sale was not to be applied to the payment of the notes, but such proceeds were to be paid to the interpleaders—the sureties on the notes—in proportion to the respective amounts for which each might be surety, as evidenced by the said notes. The interpleaders were not creditors of the said Duncum; they were only sureties upon the several promissory notes, upon which notes neither of the interpleaders had paid anything."

2d. "That in this instrument the grantor Duncum reserves the surplus to himself; and the court instructs the jury that the reservation of the surplus by a failing or insolvent grantor stamps the deed as constructively

fraudulent. That such a reservation is, as settled by the highest judicial authority, the grantor preferring himself to dissenting creditors. A failing or insolvent debtor can reserve no use or benefit to himself out of the propertyassigned or conveyed. He may stipulate for a release, but he must deliver the whole of his property not exempt by law to the payment of all his creditors; not necessarily to the payment of all in equal proportions, for he may prefer such as he may elect, but the deed must provide for the distribution of any surplus that may remain in the hands of the trustee or assignee among his creditors. In this case there is a surplus reservation in favor of the grantor. It is in these words, to wit, 'holding the remainder subject to the order of the said W. H. Duncum.' "

3d. That " it has always been held that whatever trust of this character—that is, of the title to property by a failing or insolvent debtor—may be valid, any instrument which secures to the assignee any interest in or an unlimited control over the property conveyed, and which has the effect of hindering or delaying creditors, is void as being a fraud upon those creditors."

Record, pp. 39, 40.

The plaintiffs in error also excepted to the entire charge of the court as contained in their bill of exceptions, because the said charge did not correctly charge and state the law of the case.

Record, pp. 40, 41, 42, 43, 44.

IV.

Verdict and Judgment.

The jury thereupon found the issues made by the interplea of the plaintiffs in error, and the answer thereto, in

favor of the defendant in error, and, a motion for a new trial having been made and overruled, the court ordered and adjudged that the plaintiffs' attachment be sustained, and that the marshal pay to the plaintiffs the money, *not exceeding the amount of its judgment*, and costs, now in his hands arising from the sale of the attached property herein, and that the plaintiff recover from the interpleaders its costs herein expended by reason of said interplea.

And from this judgment the writ of error in this case is prosecuted.

Record, pp. 5, 6.

V.

Questions Presented by the Record.

The charge of the trial court presents the questions which are involved in the determination of this case, and are as follows:

1st. Was the deed of trust executed by Duncum to Salters to secure the beneficiaries named in said deed against the payment of the notes of said Duncum described in said deed, and for the payment of which the said beneficiaries were the sureties for said Duncum, fraudulent and void against the general and unsecured creditors of said [redacted] Duncum?

2d. Was said deed of trust fraudulent and void as against such creditors because it was made to indemnify the sureties of Duncum upon the notes described in said deed, although, at the date of the said deed, the said notes had not matured nor become payable?

3d. Was the said deed of trust fraudulent and void as to such creditors because it provided that the trustee should return to said Duncum any surplus of money de-

rived from the sale of the property described in the deed, after the payment of the several promissory notes described therein, and to secure the payment of which the said deed was executed by said Duncum?

4th. Was the court authorized upon the evidence contained in the bill of exceptions—and there was no other submitted to the jury—in instructing the jury "that the deed under which the interpleaders claim the property in controversy is fraudulent on its face, and the same was a sufficient ground for the plaintiffs' attachment," although there was no evidence submitted to the jury that the plaintiff, Kingman & Company, at the date of suing out said attachment, were creditors of said Duncum?

VI.

Assignment of Errors.

1st. The United States court for the Indian Territory erred in instructing the jury that the deed of trust from Duncum to Salters, and under which plaintiffs asserted their lien or claim, was an instrument wanting in several of the essentials of a deed of trust, "and that in some of its features it was new and without precedent in the customs of conveying."

2d. That court erred in instructing the jury as follows: "That the interpleaders were not creditors of the defendant Duncum; they were his sureties only upon the promissory notes upon which notes neither of the interpleaders had paid anything."

3d. That court erred in instructing the jury as follows: "That there was no valuable consideration passing from the interpleaders to the defendant Duncum, such as to uphold the instrument relied upon."

4th. That court, upon the evidence, erred in instructing the jury as follows: "That under the instrument, the deed of trust, until default should have been made in the payment of some one of said notes, the defendant Duncum was to remain in possession of said property, goods, wares, and merchandise, and proceed to sell the same as he had before done," because the evidence showed that Duncum never had possession of said property at any time after the trustee had been notified of the trust and had agreed to accept the same.

5th. That court erred in instructing the jury as follows: "That in this instrument, the deed of trust, the grantor Duncum reserves the surplus to himself, and the court instructs the jury that the reservation of the surplus by a failing or insolvent grantor stamps the deed as constructively fraudulent; and that such a reservation is, as settled by the highest judicial authority, the grantor preferring himself to dissenting creditors."

6th. That court, upon the evidence, erred in instructing the jury as follows:

"That it has always been held that whatever trusts of this character—that is, of title to property by a failing or insolvent debtor—may be valid, any instrument which secures to the assignor any interest in or an unlimited control over the property conveyed, and which has the effect of hindering or delaying creditors, is void, as being in fraud of those creditors."

7th. That court erred in instructing the jury as follows: "That the deed under which the interpleaders claim the property is fraudulent on its face, and the same was sufficient ground for the plaintiffs' attachment, and the jury should render their verdict in favor of the plaintiffs."

8th. That court erred in expressing to the jury the opinion "that the finding, their verdict in this case, whether

based upon the face of the instrument itself or in view of the evidence, must be in favor of the plaintiffs."

9th. That court erred in not submitting to the jury upon the evidence the question as to the fraudulent intent of Duncum in making the deed of trust to Salters; because the deed, not being fraudulent upon its face, could not be avoided or rendered void as to the unsecured creditors of Duncum unless it was made by Duncum with the intent to hinder and delay his creditors in the collection of their debt, and the trustee was aware of that intent when he accepted the trust.

10th. That court erred in instructing the jury that the defendants in error, as plaintiffs in the court below, could legally maintain their writ of attachment against the said W. H. Duncum, because there is no evidence in the record and none offered at the trial to prove the fact that on the 27th day of July, 1889, the date of the said deed of trust, or on the 28th day of September, 1889, the date of said attachment, the said defendants in error were creditors of the said W. H. Duncum.

VII.

Brief and Argument for Plaintiffs in Error.

A. The plaintiffs in error had the right, under the statutes in force in the State of Arkansas, to assert their lien upon and claim to the property taken from them by the United States marshal by virtue of the attachment sued out by the defendant in error against W. H. Duncum.

This right is conferred by section 356 of chapter IX of the Statutes of Arkansas, relating to attachments, and is as follows:

"Any person may, before the sale of any attached property, or before the payment to the plaintiff of the proceeds thereof, or of any attached debt, present his complaint, verified by oath, to the court, disputing the validity of the attachment, or stating a claim to the property, or an interest in or lien on it under any other attachment, or otherwise, and setting forth the facts upon which such claim was founded, and his claim shall be investigated."

The proceedings to be had after such claim has been made are provided in section 358, which is as follows:

"The court may hear the proof, or may order a reference to a commissioner, or may impanel a jury to inquire into the facts. If it is found that the claimant has a title to, or lien on, or any interest in such property, the court shall make such order as may be necessary to protect his rights. The cost of the proceeding shall be paid by either party, at the direction of the court."

It was under the authority and sanction of this statute that the plaintiffs in error asserted their lien upon, and claim to, and interest in said attached property, and it was sufficient to authorize the proceedings to which they resorted for the protection of their rights.

B. The validity of the deed of trust executed by Duncum to Salters as trustee, and dated July 27, 1889, is to be determined by the principles of the common law, and not by the statutes or decisions of the supreme court of the State of Arkansas; and by the principles of the common law the said deed of trust is valid and must be sustained.

The correctness of this proposition is to be determined by a solution of the questions involved in demonstrating the validity of said deed of trust. The judge of the trial

court declared the deed under which the plaintiffs in error asserted their lien upon and claim to the property seized by the United States marshal to be fraudulent and void by reason of its provisions, and without any evidence of a fraudulent intent on the part of the grantor to hinder and delay his creditors in the collection of their debts.

The plaintiffs in error, against the erroneous assumption of the judge who charged the jury to ignore and disregard the provisions and legal effect of said deed of trust, contend as follows:

1st. That the validity of said deed of trust is to be determined by the principles of the common law and not by the provisions of the statutes of Arkansas relating to assignments; nor by the decisions of the supreme court of that State upon that subject, for these were not in force; nor did they furnish the rule of decision in regard to conveyances or assignments for the benefit of creditors when said deed of trust was made.

This proposition is established by the following authorities:

In the case of Thompson *et al. v.* Rainwater *et al.* 4 United States Appeals, 8th Circuit, 217–219), among the objections urged was, that there was no statute or law in force in the Indian Territory in 1885 regulating or authorizing assignments for the benefit of creditors, and that therefore the court was without power to render a decree which would reach the property of insolvent debtors in the hands of a person who had received it, in trust, to apply the proceeds to the payment of the debts of such insolvent debtors. The court answered this objection in the following language:

"It has been contended in this court that the appellees are without right to relief because at the date of the

alleged assignment by Smith & French there was no statute or law in force in the Indian Territory, where the assignment was made, authorizing such a conveyance. We think this contention was wholly without merit. In the absence of any statute regulating or expressly authorizing assignments, Smith & French certainly had power to pay their debts, and to that end might transfer their property to a third person for the benefit of their creditors; and we think that the transaction between Smith & French and Johnson Thompson created a trust for the benefit of the creditors of the firm, which the United States court in the Indian Territory had power to enforce. In cases of equitable cognizance, of which that court has jurisdiction under the act of March 1, 1889 (25 Stat. 783; Rev. Stat., sec. 913), it is its right and duty to apply those general rules of law which are usually recognized and enforced by courts of equity."

In the case of Appolos *v.* Brady (4 United States Appeals, 8th Circuit, 210) the controversy related to the validity of a written instrument which was claimed by Appolos to be a mortgage. He claimed under it against the creditors of the grantor. The creditors claimed the property described in the mortgage under attachment proceedings commenced against the grantor. The court, in its decision, declared as follows:

"The errors assigned relate only to the question touching the instrument under which the intervener claimed the property, the correctness of the verdict on the issues made upon the attachment not being questioned before this court.

The act of Congress of May 2, 1890 (26 Stat. 81, 94, c. 182, sec. 31), makes applicable to the Indian Territory certain portions of the statutes of the State of Arkansas, including the chapter dealing with the subject of assignment of property for the benefit of creditors. When called upon to construe the sections of the statute thus adopted, we deem it our duty to follow the construction given thereto by the supreme court of Arkansas."

The court held that the instrument claimed to be a mortgage was, under the statutes and decisions of the supreme court of Arkansas, an assignment and not a mortgage; and as an assignment it was void under the provisions of the statute of the State of Arkansas regulating assignments, and the decisions of the supreme court of that State construing that statute.

The act of May 2, 1890, declares that certain general laws of the State of Arkansas, in the volume known as Mansfield's Digest of the Statutes of Arkansas, "*are hereby extended over and put in force in the Indian Territory* until Congress shall otherwise provide." It can have no retroactive effect. It cannot affect either assignments or deeds of trust executed previous to that date. The statutes of the State of Arkansas relating to assignments for the benefit of creditors, and the decisions of the supreme court of that State, did not furnish the rule of decision for the United States court in the Indian Territory until the passage of that act. If this proposition were not clearly established by the authorities above cited, it is placed beyond all doubt by the decisions of this Court in the following cases:

It was only the declaration of elementary and familiar law when the general rule upon this question was announced by this Court in Murray *v.* Gibson (15 How. 421, 423), as follows:

"As a general rule for the interpretation of statutes, it may be laid down that they never should be allowed a retroactive operation where this is not required by express command, or by necessary and unavoidable implication. Without such command or implication, they speak and operate upon the future only."

The same principle of construction is announced in the following cases :

Chew. Heong *v.* United States, 112 U. S. 556.
Shreveport *v.* Cole, 129 U. S. 36, 43.

It was because there was no statute in force in the Indian Territory regulating or authorizing conveyances or assignments for the benefit of creditors that the statute of Arkansas relating to those subjects was "extended over and put in force in the Indian Territory;" but the adoption of that statute as the law by which the validity of *future* conveyances and assignments for the benefit of creditors in the Indian Territory should be determined did not render invalid any such conveyance or assignment made in the Indian Territory or relating to property therein, made previous to May 2, 1890.

2d. That said deed of trust is valid and must be sustained upon those principles of law which are to be applied to its construction as a conveyance intended by the grantor to protect his sureties from loss in case of the default of the grantor.

a. The conveyance made by Duncum to Salters for the protection of the persons named therein as sureties, on the notes described therein, was not of that peculiar or unusual character which would render it inoperative as a deed of trust for the purposes expressed in it, nor void because it did not express the intent and purpose of the grantor.

b. It was a conveyance in trust to secure and indemnify against loss the persons named therein as *cestuis que trust*, who were sureties on the promissory notes signed by Duncum and themselves to secure the payment of money loaned to Duncum, and this was a sufficient consideration for the deed.

c. The reservation of the right of possession of the property described in the deed to the grantor until default should be made by Duncum in the payment of the notes described therein did not render said deed fraudulent and void as against the general or unsecured creditors of Duncum.

d. The fact that Salters, the trustee, took possession of the property covered by the deed of trust before the maturity of the notes described therein did not render it fraudulent and void as to such creditors.

C. The deed of trust upon which the plaintiffs in error relied to establish their lien was, in terms and form, sufficiently expressive of the purpose of the grantor to convey his property to the trustee, and was legally sufficient to vest the title to the property in the trustee for the purposes expressed in the trust deed.

Perry on Trusts (vol. I, sec. 82, 3d ed.) declares the law upon this subject as follows:

"There is no particular formality required or necessary in the creation of a trust. Any agreement or contract in writing, made by a person having the power of disposal over property, whereby such person agrees or directs that a particular parcel of property, or a certain fund, shall be held or dealt with in a particular manner for the benefit of another, raises a trust in favor of such other person against the person making such agreement, or any other person claiming under him or with notice."

The conveyance from Duncum to Salters contained all the elements of a trust as defined in the authority above quoted, as a reference to its provisions will make exceedingly plain.

1st. The conveyance is in writing.

2d. The grantor directs that the property described in the conveyance shall be held or dealt with by the trustee for the benefit of the *cestuis que trust*, who are named and are described as sureties for the payment of the promissory notes described in the deed.

3d. The trustee is named and his duties defined; and the property placed in his hands sufficiently described.

4th. The conveyance was to become null and void and to be released upon payment of the notes described in it.

5th. The trustee was to sell the property described in the conveyance upon default being made by Duncum in the payment of either of said notes; and the trustee was to sell the property on request of the *cestuis que trust* or either of them, after such default, to the highest bidder for cash in hand, at public or private sale, in bulk or at retail, as may seem to the trustee or his successor best.

6th. The trustee was to pay to the said *cestuis que trust* out of the proceeds of the sale of said property the respective amounts for which each may be surety at the time of said sale, as evidenced by the said notes, and the payment that may be made thereon to pay the expenses of the trust, and hold the remainder subject to the order of the grantor named in the conveyance.

This conveyance created a trust for the payment of certain debts, payable by the grantor. It was not an assignment for the benefit of certain specified creditors of the grantor, and therefore is not subject to the limitations and conditions of an assignment for the benefit of creditors, either with or without preference as prescribed by the law upon that subject.

Perry on Trusts, vol. II, secs. 589, 590, 3d ed.

D. The principal debtor and grantor in said deed of trust could have made an absolute sale of the

property described in the deed of trust, either to the payees named in said notes or to the *cestuis que trust* who were sureties for their payment, and such absolute sale made for the purpose of paying said notes would have been a legal and valid sale; and the said grantor had the same right to make a conditional sale or conveyance of said property to indemnify said sureties against such liability as would result to them upon the grantor in said deed making default in the payment of said notes.

This proposition is sustained by authorities so numerous and conclusive that a statement of the principles they assert will relieve the Court of any necessity of making a laborious examination of them.

In the case of the United States *v.* Hooe *et al.* (3 Cranch, 74), the validity of a deed of trust of real estate executed by John Fitzgerald to W. and J. C. Herbert to secure and idemnify Robert T. Hooe against loss by reason of his being surety on the official bond of said Fitzgerald as collector of customs for the port of Alexandria, and also to indemnify said Hooe against loss by reason of his indorsment of certain notes signed by said Fitzgerald and discounted at the bank of Alexandria. Fitzgerald was indebted to the United States at the date of his death. The bill filed by them against the trustees, the *cestui que trust*, and the executors, widow and heirs of Fitzgerald charged that Fitzgerald died insolvent, and claimed that the United States had a right in preference to all others to apply his property to the discharge of the debt due from Fitzgerald to the United States, and that the deed of trust was fraudulent as to the United States.

Chief-Justice Marshall, delivering the opinion of the Court, and considering the validity of the deed of trust there under consideration, used the following language:

"The first point made in this case by the attorney for the United States is that the deed of the 16th of January, 1799, is fraudulent as to creditors generally.

"It is not alleged that the consideration was feigned, or that there was any secret trust between the parties. The transaction is admitted to have been in truth what it purports to be, but it is contended that the deed, on its face, is fraudulent as to creditors.

"The deed is made to save Hooe on account of his having become the security of Fitzgerald to the United States, and on account of notes to be indorsed by Hooe for the accommodation of Fitzgerald in the bank of Alexandria.

"These are purposes for which it is supposed this deed of trust could not lawfully have been executed, and the deed has been pronounced fraudulent under the statute of the 13th of Elizabeth.

"This statute contains a proviso that it shall not extend to conveyances made upon good consideration, and *bona fide*. The goodness of the consideration in the case at bar has been admitted."

As to the deed of trust here contested and declared void by the court below, the *consideration* is proved to have been what it is alleged to have been; and the whole transaction is shown by the evidence to have been just as it was stated in the deed, and it is not alleged nor shown that there was any secret trust between the parties, which would render the deed void.

In Stewart *et als. v.* Burnham *et als.* (115 U. S. 67) the facts revealed by the record were as follows:

1st. One Broughton carried on business as a merchant at Rodney, Mississippi, and became indebted to Stewart Brothers and Company, for moneys advanced on account of the purchase of cotton, in about the sum of $34,000.

Being pressed for payment, he gave, on May 26, 1881, his two promissory notes therefor, payable in six and

eight months after date, and to secure their payment he executed a written instrument of that date by which he conveyed to C. J. Pintard all of his stock of merchandise, assets, and property in trust to secure the payment of said notes, and in case of default in their payment to sell the property conveyed at public auction, for cash to the highest bidder, at the request of the holders of said notes, on twenty days' notice.

3d. The written instrument also provided that Broughton should have the right to carry on the business as heretofore, for the purpose of selling the stock of goods and collecting in the notes due and to become due, and Stewart Brothers and Company also agreed to advance to Broughton the further sum of $1,000 to enable him to carry on the business, which last sum should also become due in six months.

4th. The parties to the above agreement having been advised that it was ineffectual and void as against the other creditors of Broughton, by reason of the last provision therein, the grantor and trustee united in a conveyance of the same property unconditionally to Stewart Brothers and Company in satisfaction of the debt represented by the notes, and the latter took possession of the property conveyed; and on the same day Broughton executed a bill of sale for the same property, upon the same consideration, to Stewart Brothers and Company.

Mr. Justice Matthews, delivering the opinion, disposed of the objections urged against the validity of these several written instruments in the following language:

"It is contended by the appellees that these conveyances, the last as well as the first, are fraudulent against creditors, *per se*, and void on their face; and such was the decree appealed from, as stated in the opinion of the court. To this we cannot accede. Assuming that the

conveyance to Pintard, in trust, was of that character, according to the law of Mississippi, it does not follow that the subsequent sale and transfer, followed by delivery of possession, is tainted by the vice of the original transaction. The objection we are considering assumes that the whole transaction, from the beginning, was free from actual and intended fraud, and was meant to be a mode of securing and paying an actual debt, in good faith, *without any design injurious to other creditors, beyond that implied in obtaining a preference, which is not forbidden by law.* In this view, the admission that the conveyance to Pintard was illegal does not affect the subsequent sale, which, on the contrary, being free from objection on account of its own nature and form, served to remedy the defects in the original security. It was quite competent for the parties to rescind and cancel the first conveyance, and unite in the execution of another, free from objection. This is all they did."

In Estes *v.* Gunter (122 U. S. 450) the creditor, Gunter, previous to making an assignment for the benefit of his creditors, but on the same day, had executed a deed of a house and lot to one J. G. Hall to secure the firm of Boothe, Rice & Carleton, who were sureties on his note, held by the Bank of Sardis, for $1,000, due on the 1st of December, 1882. This deed was to be void if the note was paid at maturity; otherwise the trustee was, on the written request of the sureties, to take possession of and sell the property at public auction after due notice and apply the proceeds to its payment, and any surplus remaining after payment of the note was to be returned to the grantor.

In subsequent litigation which followed between different classes of creditors of Gunter, in regard to the validity of the assignment made by him for the benefit of his creditors, it was contended that the assignment made by Gunter was fraudulent and void for four reasons, which

were stated in the opinion of the Court. It was alleged as the *first* objection to the validity of the assignment -- and that is the only objection which relates to the question we are now considering -that it was fraudulent because of the execution of the trust deed to Hall to secure the sureties on his note held by the Bank of Sardis.

This Court, Mr. Justice Field delivering its opinion, disposed of this objection in the following language:

"Nor did the deed to Hall, to secure the sureties on the assignor's note, affect the validity of the assignment, though made in contemplation of it. Such security might have been provided in the assignment itself. The assignor had a right to use his property to protect parties who had become his sureties, as well as to pay existing debts. Until the assignment, he could dispose of his property in any way he may have thought proper, so that he did not thereby defraud any of his creditors.

"The court below seems to have concluded that the two instruments, the assignment and the deed to Hall, should be considered together, and as the deed contained a proviso that the grantor was to remain in possession of the property until the note matured, and the sureties should request the trustees to take possession of the same, there was such a reservation for the benefit of the grantor as rendered the assignment invalid. The deed was in fact a mortgage of the property to secure against a prospective liability; and in such case it is usual for the grantor or mortgagor to remain in possession of the property until the maturity of the obligation and a sale of the premises. Standing by itself the deed was not open to any serious objection."

This decision is conclusive of the validity of that conveyance, which, in the case under consideration, the court in the Indian Territory decided to be "constructively fraudulent" and "fraudulent on its face."

It is evident that the learned judge of that court had

examined only the case of Means *v.* Dowd (128 U. S. 273–280), when he gave to the jury the very remarkable charge found in the record in this case.

The deed of trust in this case contains none of the vicious provisions which were denounced in the deed of trust construed in that case, or in the cases of the Bank *v.* Hunt (11 Wall. 391), Robinson *v.* Eliott (22 Wall. 513), and Hamilton *v.* Russell (1 Cranch, 309).

It is no longer doubtful that a debtor, under the rules of the common law, has an absolute right to devote his entire estate to the payment of the claims of a particular creditor. That right, as declared by Chief-Justice Marshall in Brashear *v.* West (7 Pet. 608, 614), results "from that absolute ownership which every man claims over that which is his own."

The principle so clearly stated in the above case has been repeated with great force by Mr. Justice Field, in Mayer *et al. v.* Hillman (91 U. S. 496–500); by Mr. Justice Harlan, in Reed *v.* McIntire (98 U. S. 507, 509, 510, 511); by Mr. Justice Matthews, in Fitzpatrick *v.* Flannagan (106 U. S. 648, 660, 661), and by Mr. Justice Gray, in Jewell *v.* Knight (123 U. S. 426, 432), and in Smith *v.* Croft (*ibid.* 436, 441).

These cases are but a restatement of the proposition stated with remarkable clearness and irresistible force in Marbury *v.* Brooks (7 Wheaton, 557, 577).

In Totten *v.* Brady (54 Maryland, 170) the grantor was embarrassed and in failing circumstances. He made a conveyance of property to one of his creditors to pay a debt due to such creditor. It was held that the deed was not void if made in good faith in payment of an honest debt.

In Harden *v.* Wagner (22 West Va. 356, 362, 365) the grantor made a trust deed of personal property and

choses in action to secure the payment of a note payable one day after date. The deed provided that the trustee should sell the property on demand of the *cestuis que trust*, or either of them. It also provided that the trustee should continue the business as a means of realizing the trust fund and with a view of winding up the business. It was there held that such a deed was not fraudulent *per se*.

In Dunlap *v.* Eppler (88 Ills. 82) it was held that a mortgage given to indemnify a surety may provide that the mortgagee, *without having been damnified as surety*, may upon the maturity of the debt take possession of and appropriate the property to the payment of the debt; and if he fails to take possession the property will be liable to execution against the mortgagor.

In the case of Cooper *v.* Whitney (3 Hill, 95, 101) it is shown that Morse conveyed certain lands to Burlew. Morse was indebted in the amount of three mortgages to St. John, Laquire, and Burlew; and he conveys by deed in fee to Burlew, who, by a separate instrument, executed at the same time, agrees that if he can sell the premises, within a reasonable time, for more than enough to satisfy the three debts and his expenses, he will pay the excess to Morse. These two instruments constituted but one conveyance, and are part of the same transaction, and Mr. Justice Bronson, speaking for the court, described their character in the following language:

"Although the conveyance consisting of the deed and covenant was not in the most usual form for making a mortgage, it had all the essential qualities of a mortgage with the single exception that there was no express condition that the deed should become void on payment of the debt which it was made to secure. It may be without such a condition Morse could not redeem, and then there is undoubtedly some difficulty in holding that this

was a technical mortgage. What, then, was the transaction? It was not a case of purchase and sale. Burlew did not take the land to his own use. He was to sell and pay three specified debts, and return the surplus money to the grantor. *This was a trust valid both at the common law and under our new code.*"

The proposition we are here considering has been so frequently considered and decided that the law upon this subject has become crystallized into the following statement of the law as the result of numerous authorities upon that subject, to wit:

A debtor has the right to prefer one creditor to others, by giving mortgages or otherwise, unless such preferences contravene some provision of the assignment or bankrupt laws. He can make these preferences by giving a mortgage on his chattels for a pre-existing or present indebtedness.

E. The deed of trust from Duncum to Salters as trustee was not fraudulent and void upon its face neither because it provided that the trustee should not take possession of the property which was security for the payment of the notes specified in the deed until said notes became due and default had been made in the payment thereof by Duncum, nor because it provided that the trustee should hold any surplus which remained after the payment of said notes, subject to the order of the grantor in said deed.

a. *As to the retention of possession of the mortgaged property by the debtor until his default.*

The court instructed the jury that these two provisions of the trust deed rendered it fraudulent and void upon its

face and as a matter of law. It has already been conclusively established that the grantor in said deed, although he may have been insolvent and in failing circumstances at the time the said deed of trust was executed, had an undoubted right to make the deed for the purpose therein expressed, and that the consideration therefor was not only a good and valuable, but was a sufficient consideration. It is equally easy to demonstrate that said deed was not fraudulent in law by reason of either of the above facts.

In the case of the United States *v.* Hooe, above cited, it was objected that the deed was fraudulent and void, because the grantor remained in possession after the deed had been executed and delivered. This objection was there answered as follows:

"But the difference is a marked one between a conveyance which purports to be absolute and a conveyance which, from its terms, is to leave the possession in the vendor. If in the latter case the retaining possession was evidence of fraud, no mortgage could be valid. The possession universally remains with the grantor until the creditor becomes entitled to his money, and either chooses or is compelled to exert his right."

The deed of trust here challenged did not expressly provide that the debtor should retain possession of the property a single hour after the execution of the trust deed. That inference is drawn from the provision of the deed in regard to the trustee taking possession of the property, after default in the payment of the notes, at the request of the *cestuis que trust*, or either of them. The evidence shows that the debtor never was in possession of the property covered by the trust deed subsequent to the time the trustee was notified of his appointment, and agreed to accept the trust. The temporary possession of the trust property by the debtor until the notes specified in the trust deed

became due was not inconsistent with the terms or objects of the trust. It has been repeatedly held in such cases that the retention of the trust property by the debtor did not render the trust fraudulent.

In Sommerville and Crutcher *v.* Horton, adm'r, (4 Yerger, 541, 549), the deed of trust conveyed personal property to secure the payment of $5,000, which one Kingsley owed to the Branch Bank of the State of Tennessee. The deed of trust was dated August 17, 1819; and by the terms of the trust deed, if the debt was not paid by the 20th of September, 1820, the trustees were authorized to sell immediately the property therein mentioned and to apply the proceeds thereof to the payment of the debt; and should anything remain after satisfying the debt, they were to pay it to Kingsley. The trustees permitted the debtor to remain in possession of the property; and on the 21st of February, 1821, they advertised it for sale on the 24th of March, 1821. On the 2d of March the property was levied upon by the sheriff to satisfy certain executions which had been issued upon judgments that had been rendered against Kingsley. The trust deed was alleged to be fraudulent as to the other creditors of Kingsley. Chief-Justice Catron, delivering the opinion of the court, answered that objection in the following language:

"We recognize the soundess of the argument that if the deed did in fact hinder and delay the creditors of Kingsley it is void and no matter what were the intentions of the officers of the bank and the grantor. *But this position can only rest on the fact that the property was holden in trust for Kingsley*, and not for a creditor or the bank. To rebut such a conclusion it is proved that the debt due the bank was much larger than the sum the property produced or was worth. It was neither illegal nor immoral

to prefer one set of creditors to another, *especially innocent sureties*. The trust in its creation seems to have been a fair transaction, calculated to answer a fair and legal purpose, by legal means; nor do we see anything in the manner of carrying it into execution which would stamp the deed as *intended* to hinder and delay creditors."

Farquharson *v.* McDonald, 2 Heisk. (Tenn.) 404, 408, 417.

Baldwin *v.* Peet, 22 Texas, 708, 714, 718.

b., As to payment of the surplus to the debtor.

This provision did not render the trust deed fraudulent and void in law, nor fraudulent in fact.

Beck *v.* Burdell, 1 Paige Ch. R. 305, 310.

Hoffman *v.* Mackall, 5 Ohio St. R. 124, 130, 131.

Fechheimer *v.* Baum, 43 Federal Rept. 719, 726.

A mortgage upon goods and chattels designed to give a *lien* upon the same as security for the payment of a debt, although it necessarily *creates a trust as to the surplus*, yet the trust is not the object of the assignment, nor is it such a trust as renders it void as against the creditors of the vendor. The statute of frauds does not apply to mortgages. The statute does not prohibit the making of a chattel mortgage, nor does it make such mortgages void, because the mortgagee stipulates what the law would require him to do—that is, to restore the surplus after the sale of so much as shall be sufficient to pay and satisfy the debt which was secured by the mortgage.

Godchaux *v.* Mulford, 26 Cal. 316.

Abercrombie *v.* Bradford, 16 Ala. 565.

Neally *v.* Ambrose, 21 Pick. 185.

Halsey *v.* Whitney, 4 Mason C. C. 222.

Leith *v.* Hollister, 4 Comst (N. Y.) 214.

Camp *v.* Thompson, 25 Minn. 175.

The provision of the trust deed, that the trustee, after having paid the notes described therein, should hold the balance remaining after such payment subject to the order of the debtor, would not render the deed void even if it were treated as an assignment for the benefit of creditors.

In Burrell on Assignments, sect. 207, p. 269, this question and the conclusion reached thereon are stated as follows:

"Whether an *assignment* providing for only a part of the creditors, and without making provision for the rest, directing the assignees to pay back or reassign to the assignor the surplus which may remain after satisfying the debts provided for, will be sustained, has given rise to much conflict of opinion. The weight of authority is in favor of the validity of such an assignment."

It is therefore demonstrated upon these authorities that the said deed of trust was not fraudulent upon its face, or in law, by reason of the provisions therein contained, that the trustee should not take possession of the trust property until default should be made by the debtors in the payment of said notes, and that the trustee should return to the debtor any surplus of money remaining in his hands as the proceeds of the sale of said property after the payment of said notes. And it is equally clear that said deed would not be void for that reason even if it were construed as an assignment for the benefit of creditors.

F. The deed of trust executed by Duncum to Salters created a *lien* upon the property described in the deed in favor of the *cestuis que trust* named as security for the payment of the notes specified therein, and the *lien* thus created was sufficient to protect the property to which the *lien* attached

from the attachment sued out by the defendant in error.

That deed created an *equitable lien* upon the specific property described in it, by means of which the *cestuis que trust* named in the deed had the right to have the property, or its proceeds, applied to the satisfaction of the debts for the payment of which the property, by the deed, became security. No special form is necessary to create such a lien, if the *intention* is apparent. If the transaction, as expressed in the written contract, resolve itself into a security, whatever may be its form, it is in equity *a mortgage lien*. This *lien* is more clearly defined in Lawson's Rights, Remedies and Practice, vol. VII, sec. 3094, p. 5035, as follows:

"Every express executory agreement, whereby the contracting party sufficiently indicates an intention to make some particular property, real or personal, a security for a debt or other obligation, creates an equitable lien upon the property so indicated, which is enforceable against the property. Therefore an equitable lien will be decreed whenever a debtor has, in good faith, contracted with a creditor that the latter shall have a lien upon specified property as security for a debt."

The character and effect of such a lien are expressed with great force and unmistakable clearness by Judge Caldwell, of the United States circuit court for the eastern district of Arkansas, in Bartlett *v.* Leah (1 Fed. Rept. 768, 770).

In that case the question involved was whether the written instrument under which the interpleaders there claimed the property, as against creditors who had caused it to be seized under attachment proceedings, was an assignment or a mortgage in the nature of a deed of trust, and

in a very elaborate opinion that court considered the character of the instrument under the claim that it was a mortgage or trust to secure the payment of debts; and, upon that subject, he used the following language:

"A mortgage does not vest the mortgagee with an absolute and indefeasible title. The equitable title, called the equity of redemption, remains in the mortgagor. The mortgage is *security* for the debt, and creates a *lien* upon the property in favor of the creditor. There is no difference in legal effect between a mortgage with a power of sale and a deed of trust executed to secure a debt where the power of sale is placed in a third person. Both are *securities* for a debt; both create *specific liens* on the property; and in both the equitable title or right of redemption remains in the debtor, and is an estate or interest in the property that the debtor may sell or that may be seized and sold under judicial process by his other creditors, subject to the *lien* created by the mortgage or deed of trust."

That section of the statute of Arkansas which has already been quoted conferred the right to assert a claim to the attached property, or its proceeds, where the person asserting the claim had "a *lien* on it under any other attachment or otherwise." The *lien* upon the property asserted by the plaintiffs in error, under and by virtue of said mortgage or trust deed, was anterior to and superior to the lien created by the attachment which the defendant in error caused to be levied on the property after it had passed into the possession of the trustee. That possession was sufficient notice to the defendant in error of the lien asserted by the plaintiffs in error.

F. The deed of trust from Duncum to Salters as trustee, not being fraudulent upon its face or fraudulent in law, could only become fraudulent and

void as to the creditors of Duncum by reason of his "*fraudulent intent to cheat, hinder, and delay his creditors;*" and the trustee and the *cestuis que trust* must have had notice of that intent; or in some way have been privy to the wrongful design of Duncum; and the existence of that intent was a question of fact to be determined by the jury.

Section 309 of chapter IX of Mansfield's Digest of the Laws of Arkansas, relating to ATTACHMENT, in the *seventh* clause or paragraph, states one of the causes for issuing an attachment in a civil action as follows:

"In an action for the recovery of money where the defendant has sold, conveyed, or otherwise disposed of his property, or suffered or permitted it to be sold, *with the fraudulent intent to cheat, hinder, or delay his creditors.*"

The only evidence in the record from which the "*fraudulent intent*" of Duncum "to cheat, hinder, or delay his creditors" is contained in the deed of trust.

It is not pretended to exist or to be found in any other part of the record.

It is shown that the deed of trust, which was declared void and set aside by the judge who tried the case in the court below, had for its purpose the protection against loss of those persons named in the deed as "*sureties*" for the payment of the promissory notes of the grantor. This was a lawful purpose. It is not pretended that the debtor's property which was conveyed to the trustee was sufficient to secure the creditors named in the deed. It is not pretended that either the trustee or the *cestuis que trust* were consulted by the debtor before this deed was made, and even if the *cestuis que trust* had procured it to be made it would not be objectionable for that reason, since it is law-

ful for a debtor to devote his entire property to the payment of a single creditor, or to any one he may prefer, and it is equally lawful for a *creditor* to procure such a preference if he acts in good faith.

The question is not as to the *effect* of the deed of trust upon the creditors not provided for, or mentioned in, or secured by, the deed; but the real question is whether the grantor and the trustee and the *cestius que trust* all participated, by means of this deed of trust, in a "*fraudulent intent*" and purpose to cheat, hinder, and delay the creditors who were not named or provided for in the deed, and were by that means prevented from resorting to the property of the debtor for the payment of their debts. There must be mutuality of participation *in the fraudulent intent*, and that intent must be shown by evidence, unless the deed of trust contains such stipulations as render it void by reason of their peculiar character. The proposition of law which is applicable to such a transaction as is presented by the facts of this record is as follows:

That to render a deed founded on a valuable consideration void for fraud, both parties must concur in a fraudulent intent, or the grantee must have notice of such intent, or in some way be privy to the wrongful design.

Clements *v.* Moore, 6 Wall. 300, 311, 312.

Howe Machine Co. *v.* Claybourn, 6 Fed. Reptr. 438, 441.

Means *v.* Montgomery, 23 *ibid.* 421, 429.

Maginac *v.* Thompson, 7 Pet. 348, 395, 396.

Prewit *v.* Wilson, 103 U. S. 22, 24.

G. The defendant in error was not entitled to a judgment for the proceeds of the sale of the property covered by said deed of trust, nor entitled to

have said deed declared fraudulent and void, unless there was such evidence submitted to the jury as would show that the defendant in error was a creditor of said Duncum at the date of making said deed.

The *affidavit* which stated the "grounds for the attachment" was not sufficient to authorize a judgment either *in personam* or *in rem* against Duncum. That affidavit did not establish the existence of a debt against Duncum in favor of the defendant in error. The right to the attachment would be established by proving the facts alleged as reasons for suing out the attachment; but the right to a judgment against the debtor would not be thereby established, since the complaint shows that *the cause of action* against the debtor resulted from the existence of two promissory notes, alleged to have been signed by the debtor and to have been held and owned by the defendant in error. The notes were neither produced at the trial nor offered in evidence to establish a cause of action against the debtor in favor of the defendant in error. It does not follow that because Duncum had executed to the defendant in error his two promissory notes on the 19th of July, 1889, for the amount stated in the complaint, that the said notes continued to be the property of the defendant in error, or if they had been produced and proved at the trial would have established the right of the defendant in error to a judgment against Duncum. There was therefore no evidence in the record which justified the rendition of any judgment against Duncum, and it should be reversed for that reason.

Conclusion.

It necessarily follows as the result of a consideration of the authorities, and of the discussion here submitted, that

the judgment from which the writ of error in this case is prosecuted must be reversed, and the case remanded to the court rendering the same for further proceedings which shall be consistent with and justified by those legal principles to which the attention of this Court has been here directed. There was no principle of law applicable to the determination of this case which was not ignored or erroneously stated in the charge of the trial judge. He was both judge and jury, for by his declaration that the deed of trust executed by Duncum to Salters was fraudulent on its face and in law he left no question for the determination of the jury. He charged that the deed of trust was without consideration; but it has been here shown by numerous authorities of the highest character that a trust or mortgage of real estate or of personal property as indemnity or for the protection against loss of the sureties of a debtor, although he be insolvent and in failing circumstances, is a valuable and sufficient consideration for such trust or mortgage. He charged that the authority conferred upon the trustee to take possession of the property described in the trust deed upon default being made by the debtor in the payment of the notes for which the trust deed was security was the legal equivalent of an express provision in the deed that the debtor should remain in possession of the property *and continue to sell the same for his own benefit*, when the evidence proved that the debtor never had any possession or control of the property subsequent to the time the trustee accepted the trust.

The trust deed was signed and acknowledged by Duncum on Saturday, the 27th of July, and the trustee took the property described in it into his possession on Monday, the 29th of July, 1889. The deed of trust did not provide for any retention of the property by the debtor,

and the evidence proved that it was not the intention of the debtor to retain the property in his possession for any purpose. He charged that the reservation to the debtor of any surplus after the payment of the notes secured by the deed of trust rendered the deed "fraudulent on its face;" but the law in such a case, when applied to the construction of the provisions of such a trust, requires that such surplus be returned to the debtor. He charged that the trust reserved to the debtor a benefit in the trust property, when the evidence proves that he never at any time subsequent to the date of the deed exercised any control over the property conveyed to the trustee, nor attempted to secure any benefit therefrom. The debtor surrendered his entire property as security for the payment of the debts specified in the trust. This was an act authorized by law; and an agreement, or trust, or mortgage, which, in apt words, expressed that purpose on the part of the debtor will be sustained and upheld by the courts, unless it is shown to have been tainted with a fraudulent intent and purpose. A critical examination of this deed of trust will reveal the fact that it is not so anomalous—so "new and without precedent"—as is the charge of the distinguished judge who pronounced it fraudulent upon its face and fraudulent in law. This case is submitted to this Court in the confident belief that those obvious and often-repeated principles of law which the trial judge put out of consideration in his charge to the jury will find recognition here.

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